No. 91-7328-CFH
Status: GRANTED
CAPITAL CASE

Docketed:
February 19, 1992

Title: Leonel Torres Herrera, Petitioner
v.
James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Olive,Mark

Counsel for respondent: Walt,Robert S., Griffey,Margaret Portman

Entry	Date	Note	Proceedings and Orders
1	Feb 19 1992	D	Application (A91-604) for a stay of execution of sentence of death, submitted to Justice Scalia.
2	Feb 19 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Feb 19 1992		Application (A91-604) referred to the Court by Justice Scalia.
5	Feb 19 1992		Application (A91-604) denied by the Court. Justice Blackmun, Justice Stevens, Justice O'Connor, andJustice Souter would grant the application for stay of execution.
6	Feb 19 1992		(A91-604) The motion to treat the application for stay of execution as a petition for a writ of certiorari is denied. Justice Blackmun, Justice Stevens, Justice O'Connor, and Justice Souter would grant the motion and would grant the petition for a writ of certiorari.
8	Feb 19 1992		Petition GRANTED.
			**********
10	Apr 9 1992		Order extending time to file brief of petitioner on the merits until May 6, 1992.
11	Apr 9 1992		Joint appendix filed.
13	May 24 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
12	May 29 1992		Brief of petitioner Leonel Torres Herrera filed.
14	Jun 8 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
16	Jun 18 1992		Order extending time to file brief of respondent on the merits until July 10, 1992.
18	Jul 10 1992		Brief amicus curiae of United States filed.
19	Jul 10 1992		Brief of respondent James A. Collins, Director filed.
21	Jul 20 1992		CIRCULATED.
20	Jul 21 1992		SET FOR ARGUMENT WEDNESDAY, OCTOBER 7, 1992. (2ND CASE).
22	Jul ~~22~~ ~~1992~~	G	Motion of petitioner for appointment of counsel nunc pro tunc filed.
23	Jul 27 1992		Record filed.
		*	Original proceedings United States District Court, Southern District of Texas.
24	Jul 27 1992		Record filed.
		*	Original proceedings United States Court of Appeals for

2 pp

No. 91-7328-CFH

Entry	Date	Note	Proceedings and Orders
			the Fifth Circuit.
25	Aug 3 1992		Record filed.
		*	Additional proceedings U. S. Court of Appeals for the Fifth Circuit.
26	Sep 24 1992		Supplement to motion to appoint counsel nunc pro tunc filed. DISTRIBUTED.
27	Oct 5 1992		Motion of petitioner for appointment of counsel nunc pro tunc GRANTED. and it is ordered that Mark Olive, Esquire, of Tallahassee, Florida, is appointed to serve as counsel for the petitioner in this case.
28	Oct 7 1992		ARGUED.

NO. 91-7328

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

LEONEL TORRES HERRERA,

Petitioner

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION,

Respondent

RECEIVED
FEB 19 1992
6:50 a.m.
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SUPREME COURT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARK E. OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710

Counsel of Record for Petitioner

QUESTIONS PRESENTED

1.) Does it violate the Eighth and Fourteenth Amendments to execute a person who has been convicted of murder but who is innocent?

2.) If so, must state courts provide a meaningful mechanism for hearing claims of actual innocence in death penalty cases?

3.) What procedures are necessary in federal court for adjudicating claims of actual innocence in a death penalty case?

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NO. 91 -

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JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION,

Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner, LEONEL TORRES HERRERA, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals was announced on February 18, 1992 and has not yet been reported. A copy of the opinion is annexed hereto as Appendix A. The opinion of the United States District Court for the Southern District of Texas, from which Mr. Herrera took his appeal to the Court of Appeals, is also unreported but a copy is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

A. Course of Prior Proceedings

On January 20, 1982, Petitioner was convicted of murder and sentenced to death. The Texas Court of Criminal Appeals affirmed. Herrera v. State, 682 S.W.2d 313 (Tex. Crim. App. 1984). On December 12, 1990, Petitioner filed a petition for writ of habeas corpus in the Texas Court of Criminal Appeals. That Court denied relief on May 29, 1991 and denied rehearing on September 18, 1991.

On February 16, 1992 petitioner filed a petition for writ of habeas corpus in the United States District Court for the

Southern District of Texas. The district court granted a stay of execution so as to allow Petitioner to conduct an evidentiary hearing on his claim that executing an innocent person would violate the Eighth and Fourteenth Amendments. The district court also granted a stay to allow Petitioner an evidentiary hearing to demonstrate that there was a violation of Brady v. Maryland. With respect to Petitioner's other claims for relief, the district court granted Respondent's motion to dismiss pursuant to Rule 9(b).

On February 18, 1992, the United States Court of Appeals for the Fifth Circuit vacated the district court's stay of execution holding that executing a person who everyone, including the Courts, knows to be innocent did not run afoul of the constitution.

B. Material Facts

The facts that the lower court presumed to be true are that Petitioner is innocent of the crime for which Respondent intends to execute him.

REASONS FOR GRANTING THE PETITION

THE LOWER COURT DECIDED AN ISSUE OF CONSTITUTIONAL LAW WHICH THIS COURT HAS NOT BUT SHOULD RESOLVE, AND/OR DECIDED AN IMPORTANT MATTER OF LAW AT ODDS WITH THIS COURT'S JURISPRUDENCE

The Fifth Circuit Court of Appeals wrote some new law today. The Fifth Circuit assumed that the State of Texas will execute an innocent person tonight and found nothing constitutionally objectionable about it. The district court, reflecting the standards of decency in this country, had determined that Petitioner, based upon his substantial and eyewitness claims of innocence, was entitled to an evidentiary hearing on his claim of innocence in fact. That judge granted a stay of Petitioner's execution so as to enable the Courts to address Petitioner's claim.

The Court of Appeals accepted as a matter of fact that Petitioner is indeed innocent of the crimes for which he is scheduled to be executed, and so no evidentiary hearing was necessary to prove his innocence. The Court accepted as a matter of fact that Petitioner could prove his innocence. The Court of Appeals then held that executing a person who everyone, including the Courts, knows to be innocent did not run afoul of the constitution.

The rule of law scribed by the lower court in order to vacate the stay of execution is one which, as far as petitioner can tell, has never been embraced by any federal court under current death penalty statutes. According to the lower court,

Texas has no procedure available in post-conviction proceedings to prevent the execution of a person convicted in state court but who proves to everyone that he or she is innocent, and habeas corpus provides no mechanism for protecting that person.[1] This is wrong.

If states are perfectly free under the eighth and fourteenth amendments to execute persons who can prove beyond a reasonable doubt their innocence then this Court should take the responsibility of saying so and then explaining how it is that the death penalty is reliable, reserved for the most deserving, and does not strike like lightning, in conjunction with such a rule.

Petitioner asks that this Court enter an Order staying Petitioner's execution so as to allow him fully to research the novel position taken by the lower court and properly to prepare a petition for writ of certiorari containing the following issues:

1.) Does it violate the Eighth and Fourteenth Amendments to execute a person who has been convicted of murder but who is innocent?

2.) If so, must state courts provide a meaningful mechanism for hearing claims of actual innocence in death penalty cases?

3.) What procedures are necessary in federal court for adjudicating claims of actual innocence in a death penalty case?

---

[1]The lower court noted that Texas law allows newly discovered evidence to be presented at a motion for new trial, but that motion must be filed within less than thirty days of conviction and sentence.

While there has been much debate of late about capital punishment and habeas corpus, there is not yet a groundswell for executing innocent persons. Petitioner believes that a properly prepared certiorari petition could starkly present the issue for the Court, that there would be a high probability of receiving four votes for certiorari, and that the likelihood of success for a proposed rule that executing innocent persons violates the constitution would be high.

Indeed, this Court's rules already protect the innocent. As this Court declared in Beck v. Alabama, 447 U.S. 625, 637 (1980), "the risk [of an unwarranted conviction] cannot be tolerated in a case in which the defendant's life is at stake." See also Bullington v. Missouri, 451 U.S. 430, 445-446 (1981). Recent Supreme Court decisions confirm that claims of actual innocence warrant special attention in collateral proceedings. For example, the Court recently held that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for procedural default." Murray v. Carrier, 477 U.S. 478, 496 (1986); see also Engle v. Isaac, 456 U.S. 107, 135 (1982) ("[i]n appropriate cases [the principles of comity and finality that inform the concepts of cause and prejudice] must yield to the imperative of correcting a fundamentally unjust incarceration"). The Court similarly recognized the importance of actual innocence in the context of successive petitions, holding that a federal habeas court may

grant review in those cases in which the prisoner establishes "that under the probative evidence he has a colorable claim of factual innocence." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986); cf. McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454, 1471 (1991) (adopting "cause and prejudice" standard for successive petitions). Indeed, the Court has recognized that the availability of collateral proceedings stems from "the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." Stone v. Powell, 428 U.S. 465, 491-492 n. 31 (1976).

The importance of vindicating claims of actual innocence has special force in the death penalty context. As Justice Marshall emphasized in Ford v. Wainwright, 477 U.S. 39[illegible], 411 (1986) (plurality opinion), "[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." See also Gardner v. Florida, 430 U.S. 349, 357 (1980) (holding that heightened scrutiny proceeds from the recognition that "death is a different kind of punishment from any other which may be imposed in this country"); California v. Ramos, 463 U.S. 992, 998-999 (1983) (stating that the "Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death

from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

With respect to this Claim in petitioner's case, the constitutional violation is that his execution, as an innocent person, would violate the Eighth and Fourteenth Amendments. If it would violate the constitution to execute someone who was twelve (12) years old at the time of the offense, or someone who was insane at the time of an execution, then, a fortiorari it would violate the constitution to execute an innocent person. A twelve year old killer has killed, as has a killer whose sanity evaporates before execution. If the evolving standards of decency and the due process clause prohibit their executions, then a person who did not kill certainly cannot be executed.

Petitioner requests that this Court enter a stay so as to allow this issue to be properly framed and presented in a petition for writ of certiorari.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Mark Evan Olive
FL. Bar No. 0578553
2804 Glennis Court
Tallahassee, FL 32304
(904) 562-9748

Counsel for Mr. Herrera

NO. 91 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

LEONEL TORRES HERRERA,

Petitioner

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR STAY OF EXECUTION

Petitioner, by undersigned counsel, respectfully moves this Court for an immediate stay of his imminent execution. The grounds in support of this motion are set forth in more detail in the accompanying Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MARK E. OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710

Counsel of Record for
Petitioner

FEB-19-1992 05:01 FROM

NO. 91 -

IN THE SUPREME COURT OF THE UNITED STATES

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

LEONEL TORRES HERRERA, petitioner in the above-captioned case, respectfully moves this honorable Court to permit him to proceed in forma pauperis. An affidavit in support of this motion is attached.

Respectfully submitted,

* MARK E. OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710

* Member, Supreme Court Bar

FEB-19-1992 05:01

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, LEONEL T HERRERA being first duly sworn depose and say that I am the petitioner in the above- entitled case; that in support of my motion to proceed without being required to repay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes__ No✓

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.
   1975 - 1,200 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes__ No✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes__ No✓
   If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes__ No✓

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are depending upon you for support and state your relationship to those persons.
   N/A

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Leonel Torres Herrera

Subscribed and sworn to before me this 11 day of Feb, 1992

Notary

Roland L. Goodrum
My commission expires 5-15-95
Commission Expires 05-15-95

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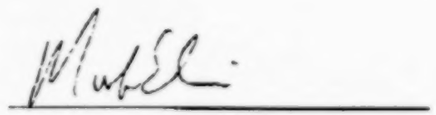
CERTIFICATE OF SERVICE

I, Mark E. Olive, a member of the Bar of this Court, do hereby certify that I have caused be served by fascimile transmission a copy of the Petition for Writ of Certiorari on the Attorney General of the State of Texas.



RECEIVED
FEB 19 1992
2:55 p.m.
OFFICE OF THE CLERK
SUPREME COURT

February 19, 1992

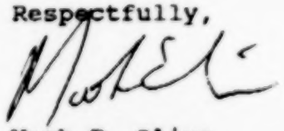
Christopher Vasil, Clerk
United States Supreme Court
Washington, D.C.

A-604

Dear Chris Vasil:

Today Mr. Herrera filed an Application for a Stay of Exeuction Pending Filing and Disposition of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. You have just advised me that the stay was denied by the Court by a vote of 5 to 4. I hereby request on behalf of Mr. Herrera that, due to the exigencies of this litigation, the Court treat the Application for Stay as a Petition for Writ of Certiorari and if the Court grants the Petition for Writ of Certiorari that the Court stay Mr. Herrera's execution pending disposition.

Respectfully,



Mark E. Olive
Attorney for Petitioner
2804 Glennis Court
Tallahassee, Florida 32304
904-644-7710

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Respectfully,

Mark E. Olive
Attorney for Petitioner
2804 Glennis Court
Tallahassee, Florida 32304
904-644-7710

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12:20 p.m.
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SUPREME COURT

A-604

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v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION,

Respondent

APPLICATION FOR A STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARK E. OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710

Counsel of Record for
Petitioner

I. INTRODUCTION

This case involves a second habeas corpus petition by a death sentenced inmate scheduled to be executed at 12:01 a.m. February 19, 1992. The district court granted a stay of execution so as to allow Petitioner to conduct an evidentiary hearing on his claim that executing an innocent person would violate the Eighth and Fourteenth Amendments. The district court also granted a stay to allow Petitioner an evidentiary hearing to demonstrate that there was a violation of Brady v. Maryland. With respect to Petitioner's other claims for relief, the district court granted Respondent's motion to dismiss pursuant to Rule 9(b).

Petitioner wishes to present at least two claims to the Court via a Petition for Writ of Certiorari. Insufficient time remains between the vacation of the stay by the circuit and the execution to file such a petition. Consequently, Petitioner files this motion for stay and presents the following bases for a stay of execution. First, he is innocent, the lower court accepted the fact of his innocence, and his execution would violate the Eighth and Fourteenth Amendments, and 2.) the lower court erred by not allowing the district court to conduct an evidentiary hearing on Petitioner's Brady claim.

THIS COURT SHOULD STAY PETITIONER'S EXECUTION SO AS TO ALLOW THE PREPARATION OF A PETITION ON CLAIM OF INNOCENCE

The Fifth Circuit Court of Appeals wrote some new law today. The Fifth Circuit assumed that the State of Texas will execute an innocent person tonight and found nothing constitutionally objectionable about it. The district court, reflecting the standards of decency in this country, had determined that Petitioner, based upon his substantial and eyewitness claims of innocence, was entitled to an evidentiary hearing on his claim of innocence in fact. That judge granted a stay of Petitioner's execution so as to enable the Courts to address Petitioner's claim.

The Court of Appeals accepted as a matter of fact that Petitioner is indeed innocent of the crimes for which he is scheduled to be executed, and so no evidentiary hearing was necessary to prove his innocence. The Court accepted as a matter of fact that Petitioner could prove his innocence. The Court of Appeals then held that executing a person who everyone, including the Courts, knows to be innocent did not run afoul of the constitution.

The rule of law scribed by the lower court in order to vacate the stay of execution is one which, as far as petitioner can tell, has never been embraced by any federal court under current death penalty statutes. According to the lower court, Texas has no procedure available in post-conviction proceedings to prevent the execution of a person convicted in state court but

who proves to everyone that he or she is innocent, and habeas corpus provides no mechanism for protecting that person.[1] This is wrong.

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While there has been much debate of late about capital punishment and habeas corpus, there is not yet a groundswell for

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executing innocent persons. Petitioner believes that a properly prepared certiorari petition could starkly present the issue for the Court, that there would be a high probability of receiving four votes for certiorari, and that the likelihood of success for a proposed rule that executing innocent persons violates the constitution would be high.

Indeed, this Court's rules already protect the innocent. As this Court declared in Beck v. Alabama, 447 U.S. 625, 637 (1980), "the risk [of an unwarranted conviction) cannot be tolerated in a case in which the defendant's life is at stake." See also Bullington v. Missouri, 451 U.S. 430, 445-446 (1981). Recent Supreme Court decisions confirm that claims of actual innocence warrant special attention in collateral proceedings. For example, the Court recently held that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for procedural default." Murray v. Carrier, 477 U.S. 478, 496 (1986); see also Engle v. Isaac, 456 U.S. 107, 135 (1982) ("[i]n appropriate cases [the principles of comity and finality that inform the concepts of cause and prejudice] must yield to the imperative of correcting a fundamentally unjust incarceration"). The Court similarly recognized the importance of actual innocence in the context of successive petitions, holding that a federal habeas court may grant review in those cases in which the prisoner establishes "that under the probative evidence he has a colorable claim of

factual innocence." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986); cf. McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454, 1471 (1991) (adopting "cause and prejudice" standard for successive petitions). Indeed, the Court has recognized that the availability of collateral proceedings stems from "the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." Stone v. Powell, 428 U.S. 465, 491-492 n. 31 (1976).

The importance of vindicating claims of actual innocence has special force in the death penalty context. As Justice Marshall emphasized in Ford v. Wainwright, 477 U.S. 399, 411 (1986) (plurality opinion), "[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." See also Gardner v. Florida, 430 U.S. 349, 357 (1980) (holding that heightened scrutiny proceeds from the recognition that "death is a different kind of punishment from any other which may be imposed in this country"); California v. Ramos, 463 U.S. 992, 998-999 (1983) (stating that the "Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

With respect to this Claim in petitioner's case, the constitutional violation is that his execution, as an innocent person, would violate the Eighth and Fourteenth Amendments. If it would violate the constitution to execute someone who was twelve (12) years old at the time of the offense, or someone who was insane at the time of an execution, then, a fortiorari it would violate the constitution to execute an innocent person. A twelve year old killer has killed, as has a killer whose sanity evaporates before execution. If the evolving standards of decency and the due process clause prohibit their executions, then a person who did not kill certainly cannot be executed.

Petitioner requests that this Court enter a stay so as to allow this issue to be properly framed and presented in a petition for writ of certiorari.

II. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT THE POLICE SUPPRESSED EVIDENCE OF HIS INNOCENCE AND OF POLICE INVOLVEMENT IN THE OFFENSES

This Court has been provided with all the pleadings heretofore filed in Petitioner's case detailing the police suppression of evidence. In preparation for the evidentiary hearing ordered by the district court, undersigned counsel had Kaul, Jr., interviewed again last night, and he provided an affidavit to counsel regarding police involvement in suppressing the truth at Petitioner's trial. This affidavit was presented tonight to the Fifth Circuit in a motion for rehearing which was denied during a telep[hone conference call between the panel and

counsel. This affidavit further demonstrates the need for an evidentiary hearing, and is reproduced here:

> 1. I am Raul Herrera, Jr. I am the same Raul Herrera, Jr. who signed the affidavit dated January 29, 1992 stating that my father, and not my Uncle Leo, killed Officers Rucker and Carrisalez.
>
> 2. Ever since I was a small child I have known that my father and my grandfather were involved in illegal drug trafficking activities with the Sheriff of Hidalgo County, Brigado Marmalejo. I accompanied my father many, many times when he was involved in these activities. Many times I went with my father on trips to Cameron County to different people's houses or to businesses where by father met with different Department of Public Safety (DPS) officers. These DPS officers wore DPS uniforms and drove DPS cars. My father oversaw the loading of illegal drugs from the houses or businesses in Cameron County into the DPS officers' cars. Then the DPS officers drove the cars, full of drugs, back to Hidalgo County. I drove back with my father and we met the DPS cars usually at my grandfather's ranch on 7 Mile Line Road in Mission, TX or at Sheriff Marmalejo's ranch outside of Edinburg, TX. The drugs were loaded into 18 wheeler trucks that carried produce.
>
> 3. One of the uniformed DPS officers who regularly made these trips with my dad was the man I later learned was named Officer Rucker. Other DPS officers were aware of these activities even if they were not directly part of it.
>
> 4. I remember taking these trips with my father during the year before my father killed the police officers and before my Uncle Leonel's trial. We kept making these trips after my Uncle Leonel's trial, all the way up until my father was killed. DPS officers always acted as security for the drug transfers.
>
> 5. I remember very clearly the period when my Uncle Leonel was tried for the murder of the two police officers. My father was very upset during this time. While the trial was going on, different DPS officers, and other police officers, came to my father's house on 6 Mile Line Road in Mission, TX to meet with my father. They had meetings like this almost every night that the trial went on. Sheriff Marmalejo came to one of these meetings. Usually there were 6 or 7 people altogether, including my father. Each night I saw DPS officers in uniform and other police officers in plain clothes at the house talking to my father. They always talked about Uncle Leonel's trial. They were angry and they wanted to make sure my father and my Uncle Leonel were not going to tell the truth about what really happened to the police officers who were killed. Police officers threatened our family. They were frightened that their drug business would be exposed.
>
> 6. After my Uncle Leonel was arrested and beaten up, I saw a picture in the newspaper of him being brought from the hospital back to the jail. I recognized one of the police officers as one of the men who I had seen snorting cocaine with my father at my grandfather's ranch, my father's house and the Las Vegas Bar in Edinburg, Tx.

This Petition further demonstrates that the district court's order was correct, and that the circuit court's ruling is at odds with this Court's law.

CONCLUSION

Wherefore, Petitioner respectfully requests that this Court enter a stay of his execution.

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2114

RECEIVED
FEB 1[illegible] 1992
OFFICE OF THE CLERK
SUPREME COURT

LEONEL TORRES HERRERA,

Petitioner-Appellee,

VERSUS

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before KING, DAVIS and JONES, Circuit Judges.

DAVIS, Circuit Judge:

James A. Collins, Director, Texas Department of Criminal Justice, appeals the district court's order staying the execution of Leonel Torres Herrera. Herrera's execution is scheduled for February 19, 1992, between midnight and dawn.

I.

The district court's thorough memorandum opinion and order of February 17 outlines in detail the critical steps which have been taken in this case. In summary, Herrera was sentenced to death on January 21, 1982, following his conviction for capital murder. The Texas Court of Criminal Appeals affirmed Petitioner's conviction and death sentence, **Herrera v. State,** 682 S.W.2d 313 (Tex. Crim.

App. 1984)(en banc). The United States Supreme Court denied certiorari, **Herrera v. Texas,** 471 U.S. 1131 (1985). Petitioner filed a petition for writ of habeas corpus in the 197th District Court of Cameron County, Texas. The convicting court recommended that relief be denied and in August 1985, the Texas Court of Criminal Appeals denied relief. **Ex parte Herrera,** Application # 12,848-02-Texas Criminal Appeals 1985. Thereafter, on August 7, 1985, Herrera filed his first federal petition for habeas corpus, and the district court stayed Herrera's scheduled execution. In October 1989, the federal district court rejected Herrera's habeas petition and dissolved the stay of execution. Herrera appealed that judgment to this court. On June 25, 1990, we affirmed the district court judgment and vacated Herrera's stay of execution, **Herrera v. Collins,** 904 F.2d 944 (5th Cir. 1990). The Supreme Court denied certiorari, **Herrera v. Collins,** __ U.S. __, 111 S.Ct. 307 (1990).

Herrera filed his second application for state writ of habeas corpus on December 12, 1990. On January 14, 1991, the trial court withdrew an earlier order, entered findings of fact and conclusions of law, and denied habeas relief. The Court of Criminal Appeals denied relief on May 29, 1991, on the basis of the trial court's finding and conclusions and vacated a stay of execution.

On December 17, 1991, Herrera filed a petition for writ of certiorari in the United States Supreme Court, which is still pending. Herrera filed the instant application for federal writ of habeas corpus in the district court on February 16, 1992, raising

five claims for relief.[1] The claims that Herrera asserts in his present petition are not duplicative of the claims he asserted in his first petition.

The district court denied all relief on claims 2,3,4 and 5 on grounds of writ abuse. The court initially denied petitioner's **Brady** claim, (which was included as part of his first claim) on grounds that insufficient facts were presented to support this claim. On reconsideration, the district court, however, concluded

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[1] Herrera raises the following claims in the instant habeas petition:

> 1. The State's failure to reveal exculpatory evidence resulted in the conviction and sentence of an innocent person, in violation of the Sixth, Eighth, and Fourteenth Amendments. Petitioner is innocent, another person has confessed to the crime, and the Petitioner's execution would violate the Eighth and Fourteenth Amendments.
>
> 2. Petitioner was tried and sentenced to death for the murder of two police officers by a jury whose members included a police officer detective in an office that investigated the case, in violation of the Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.
>
> 3. During trial, recesses, and juror deliberations, juror-police officer Bressler was armed, and at least one juror noticed; in addition, and contrary to his sworn statements during voir dire, this officer knew one of the victims. These facts reveal that Petitioner's conviction and death sentence occurred in violation of his Sixth, Eighth, and Fourteenth Amendment rights.
>
> 4. Petitioner's sentencers were precluded from considering evidence which counseled in favor of a sentence less than death, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.
>
> 5. The trial judge wrongfully refused to allow Petitioner to speak at all during Petitioner's trial and capital sentencing proceeding, thereby violating Petitioner's federal Constitutional rights.

that sufficient facts were presented to require a hearing which he scheduled for February 21, 1992. The district court granted a stay of execution pending that hearing. The district court also granted petitioner's motion for a stay of execution to permit petitioner to further litigate in state court the second prong of his first claim -- actual innocence. Alternatively, the court granted a stay pending rendition of an opinion by this court in **May v. Collins**, No. 91-6273. The district court also signed a Rule 54(b) judgment dismissing claims 2-5 and issued a certificate of probable cause as to these claims. Collins filed an appeal from the district court's order granting a stay of execution and moved this court for an order vacating the stay of execution.

II.

For reasons stated by the district court, it correctly rejected petitioner's claims 2,3,4 and 5 because the petitioner has clearly abused the writ as to those claims. **See McCleskey v. Zant**, __ U.S.__, 111 S.Ct. 1454 (1991).

On the **Brady** prong of petitioner's first claim, we agree with the district court's initial conclusion that petitioner neither proffered evidence nor alleged particularized facts that demonstrate that the state withheld any favorable evidence from Herrera before his trial. As stated above, the district court, on reconsideration, concluded that the pleadings and affidavits were sufficient to require a hearing on one issue: whether the state knew that petitioner was innocent of the murder of Officer Carrisalez and withheld that information from Herrera before his

trial. We are not persuaded that Herrera's petition as amplified by his exhibits state specific facts that "point to real possibility of constitutional error." **Blackledge v. Allison**, 431 U.S. 63, 75 n. 7, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Herrera never identifies any specific evidence that he contends was withheld by the prosecutor before trial. Instead, he relies on affidavits and newspaper clippings to suggest that the prosecutor knew that Raul Herrera, rather than Leonel Herrera, committed the murders. Nothing in any of the exhibits suggests, however, that the prosecutor could have known of the information contained within them at the time of Herrera's trial.

The newspaper clippings upon which Herrera relies make no reference at all to the instant case and do not refer to police corruption in connection with drug activity in South Texas prior to 1985 -- three years after Herrera's trial; further, they contain nothing to suggest that anyone who testified at his trial or any officials in Cameron County, where Herrera was convicted, have ever been involved in any wrongdoing. The affidavit of Raul Herrera, Jr., states that he told a police officer that this father committed the murders rather than Petitioner, but he does not say when or to whom this information was conveyed. Consequently, Herrera has not pled with sufficient particularity the elements of his **Brady** claim to require a hearing. **Id.**

Moreover, the exculpatory evidence on which Herrera relies is a claim that someone else, and not he, committed the offenses of which he was convicted. The person at whom he points the finger is

his brother, Raul, now deceased. Particularly in light of the fact that his brother allegedly committed the offense in the car which Petitioner normally drove, this information clearly was not only available to the defense, but was likely more available to the defense than it was to the prosecution. "**Brady** does not oblige the government to provide the defendants with evidence that they could obtain from other sources by exercising reasonable diligence." **United States v. McKenzie,** 768 F.2d 602, 608 (5th Cir. 1985)(citation omitted), **cert. denied**, 474 U.S. 1086, 106 S.Ct. 861 (1986). "When evidence is available equally to the defense and the prosecution, the defendants must bear the responsibility for their failure to diligently seek its discovery." **Id., citing United States v. Milstead,** 671 F.2d 950, 953 (5th Cir. 1982). Herrera's attempt to couch this claim in terms of a **Brady** violation therefore is disingenuous.

We therefore turn to the second issue which the district court concluded required it to grant a stay of execution. As a part of his first claim, Herrera contended that he was actually innocent of Carrisalez's murder. Herrera filed a substantially identical claim in the state habeas court. In support of his state habeas claim Herrera attached two affidavits. First, he attached the affidavit of attorney Hector J. Villareal, who had represented petitioner's brother, Raul Herrera, on a charge of attempted murder. Villareal asserted that Raul Herrera confessed to him that Raul, not petitioner, murdered both Rucker and Carrisalez. Herrera also submitted the affidavit of Franco Palacios, one of his brother

Raul's cell mates. Palacios stated that Raul confessed to him that Raul had murdered Rucker and Carrisalez.

When Herrera filed his federal habeas petition, he attached two additional affidavits. The most significant affidavit he attached is the affidavit of his nephew, Raul Herrera, Jr., the son of Raul Herrera. Raul Herrera, Jr. stated that he was with his father on the date of the murders and that he saw his father kill both Rucker and Carrisalez. According to Raul Herrera, Jr., the petitioner was not present when the murders occurred. Raul, Jr. also stated that he told a police officer what occurred but the officer told him never to repeat it. Raul, Jr. did not suggest when this conversation occurred. Raul, Jr. states that no attorney representing the petitioner had ever asked him about the events until recently. His affidavit is dated about two weeks ago, January 29, 1992. Petitioner also included the affidavit of an old schoolmate of the Herrera brothers, who related that Raul, Sr. made a confession to him similar to the one attorney Villareal asserted that Raul had made.

In his federal habeas petition, Herrera asserted that he was entitled to a hearing on his actual innocence claim, particularly in light of Raul Herrera, Jr.'s affidavit. The district court concluded that petitioner should have an opportunity to present the affidavit of the alleged eye witness, Raul Herrera, Jr. The district court then granted the petitioner's stay of execution and retained jurisdiction of the petitioner's "actual innocence" claim until noon, February 21, 1992. The district court directed that it

would dismiss that claim without prejudice on February 21, 1992, provided petitioner had filed a successive state habeas petition so that he could present the additional evidence to that court.

We begin our analysis of the propriety of the district court's stay with the recent admonition of the Supreme Court: "A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief may be granted.'" **Delo v. Stokes,** 495 U.S. 320, 109 L.Ed.2d 325, 328, 110 S.Ct. 1880, 1881 (1990), (quoting **Barefoot v. Estelle,** 463 U. S. 880, 895, 103 S.Ct. 3383, 3396 (1983)). This court has held that a court should consider four factors in deciding whether to grant a stay of execution:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing or irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

Byrne v. Roemer, 847 F.2d 1130, 1133 (5th Cir. 1988)(quoting **Streetman v. Lynaugh,** 835 F.2d 1521, 1524 (5th Cir. 1988)). Although in a non-abuse context the movant in a capital case "need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e. the other three factors] weighs heavily in the favor of granting the stay.'" **Celestine v. Butler,** 823 F.2d 74, 77 (5th

Cir.)(quoting **O'Bryan v. McKaskle**, 729 F.2d 991, 993 (5th Cir. 1982), **cert. denied**, 483 U.S. 1036, 108 S.Ct. 6 (1987). However, the Supreme Court's recent decision in **Delo v. Stokes**, 495 U.S. at 320, 110 S.Ct. at 1880, makes it clear that, in a case involving a second or subsequent petition, the latter three factors cannot weigh in favor of a stay in the absence of substantial legal claims upon which relief may be granted.

Herrera's claim of "actual innocence" presents no such substantial claim for relief. The rule is well established that claims of newly discovered evidence, casting doubt on the petitioner's guilt, are not cognizable in federal habeas corpus, **see Townsend v. Sain**, 372 U.S. 293, 317, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Texas has adopted a similar rule. **See Ex parte Binder**, 660 S.W.2d 103, 104-106 (Tex. Crim. App. 1983). Moreover, the right to collaterally attack a conviction is not a right guaranteed by the Constitution. **Pennsylvania v. Finley**, 481 U.S. 551, 107 S.Ct. 1990, 1994 (1987).

In **Townsend v. Sain**, 372 U.S. 293 (1963), the Court held that a federal habeas court must grant an evidentiary hearing on an allegation of newly discovered evidence only when the evidence "bear[s] upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." 372 U.S. 293 (1963). We have recognized the above statement as the Court's holding in at least two cases, **Armstead v. Maggio**, 720 F.2d 894, 896 (5th Cir. 1983)(per curiam), and **Boyd v.**

Puckett, 905 F.2d 895, 896 (5th Cir. 1990), **cert. denied**, 112 L.Ed.2d 337, 111 S.Ct. 526 (1990).

Thus, once Herrera's **Brady** claim is rejected, Herrera's "actual innocence" claim does not allege a ground upon which habeas relief can be granted. Under Texas law, a claim of innocence based on newly discovered evidence is grounds for a new trial but such a claim will not support collateral review. **See, e.g. Ex parte Binder**, 660 S.W.2d 103, 105-06 (Tex. Crim. App. 1983)(en banc). Herrera, therefore, has presented no claim for collateral relief under Texas law. Consequently, we can find no legal justification to permit him to present, in piecemeal fashion, additional affidavits to the state court. We conclude that the district court erred in granting a stay of execution for this purpose.

May v. Collins relied upon as an alternate ground for a stay, is inapposite. The question in **May** concerns whether a finding of fact by a state habeas court, based upon affidavits alone, is entitled to the presumption of correctness. But the facts at issue in **May** implicated a constitutional defect in May's conviction. No such question is presented in this case.

III.

CERTIFICATE OF PROBABLE CAUSE

The district court issued a certificate of probable cause (CPC) with respect to claims 2-5, although it rejected any relief on these claims. This certificate implies that the district court found that petitioner had made a substantial showing of the denial of a federal right with respect to these claims. **Barefoot v.**

Estelle, 463 U.S. 880 (1983). Ordinarily a stay of execution accompanies such a finding and we are uncertain whether the district court inadvertently failed to grant a stay on these claims. Because of the ambiguity of the grant of CPC on claims 2-5 and the failure to grant a stay, the press of time requires us to address the propriety of the district court's issuance of CPC.

For reasons stated by the district court, we fully agree that claims 2,3,4, and 5 are barred because petitioner abused the writ. We find no substantial grounds upon which relief might be granted on these claims. Accordingly, we vacate the certificate of probable cause as improvidently granted. **See Cuevas v. Collins**, 932 F.2d 1078, 1082 (5th Cir. 1991).

MOTION TO VACATE STAY

In sum, on claim 1, we conclude that Herrera has failed to present a substantial ground upon which relief might be granted. **See Delo v. Stokes**, 110 S.Ct. 1880, 1881 (1990). As we stated above, the petitioner failed to allege sufficiently particularized facts to entitle petitioner to relief on his **Brady** claim. The "actual innocence" claim standing alone does not state a claim upon which habeas relief can be granted by either a federal habeas court or a Texas habeas court. We therefore find no legal justification to stay the execution to allow petitioner to litigate further in state court. Accordingly, we grant Collins's motion to vacate the stay of execution entered by the district court.

United States District Court
Southern District of Texas
FILED
FEB 17 1992
Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

LEONEL TORRES HERRERA, §
Petitioner, §
v. § CIVIL ACTION NO. M-92-30
JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, §
Respondent. §

ORDER

For the reasons set forth in Memorandum of even date herewith, the Court is of the opinion that the Respondent's Motion for Dismissal pursuant to Rule 9(b) should be GRANTED IN PART and that the Respondent's Motion for Summary Judgment should be GRANTED IN PART and that the Motion for Stay of Execution of the Petitioner should be GRANTED. It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Respondent's Motion for Dismissal as to Petitioner's second, third, fourth and fifth claims for relief is hereby GRANTED, and that the Respondent's Motion for Summary Judgment as to the portion of Petitioner's first claim as to any constitutional violation under Brady is GRANTED and the Motion for Stay of Execution be GRANTED as per order of even date herewith.

It is further ORDERED that this Court will retain jurisdiction of the Petitioner's sole remaining claim which is the portion of Claim Number 1 in which he alleges he is actually innocent and that

his execution would violate his eighth and fourteenth amendment rights until noon, February 21, 1992 at which time said claim shall be DISMISSED without prejudice provided Petitioner shall have filed by then the appropriate application with the state trial court of his alleged constitutional actual innocence claim along with his evidence on that issue including his recently acquired evidence on that issue. If same be sooner said DISMISSAL shall take effect at the time of filing of said application. Petitioner shall notify this Court and Respondent immediately prior to filing his state application, if same will be filed, so that this Court can sign the appropriate DISMISSAL order on this issue. If this Court should be reversed on the holding on the claim of alleged actual innocence, this Court, as an alternative and independent grounds, would retain jurisdiction of this case until the opinion of the Fifth Circuit Court of Appeals in May v. Collins No. 91-6273 would be handed down and this Court could determine whether the holding in that case would have any application to this case.

The Clark shall send a copy of this Order to Counsel for Petitioner and counsel for Respondent.

Done this 17th day of February, 1992, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

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United States District Court
Southern District of Texas
FILED
FEB 17 1992
Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LEONEL TORRES HERRERA, Petitioner,	§	
V.	§	CIVIL ACTION NO. M-92-30
JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent.	§	

ORDER STAYING EXECUTION

Petitioner Leonel Torres Herrera was found guilty of capital murder and given a sentence of death by the 197th Judicial District Court of Cameron County, Texas. A Motion for Stay of Execution and a Petition for Writ of Habeas Corpus, pursuant to Title 28 U.S.C. § 2254, was filed with this Court on Sunday, February 16, 1992. Petitioner is scheduled to be executed on Wednesday, February 19, 1992. This Court has issued a Memorandum and Order of even date herewith which disposes of all Petitioner's claims except the portion of his first claim for relief, which the Court has retained jurisdiction over, where he alleges that he is actually innocent and that his execution would violate his eighth and fourteenth amendment rights. This Court considers this latter issue as one which requires that the Petitioner be afforded the opportunity to expeditiously present his constitutional claim of alleged actual innocence along with his evidence, including his most recently acquired evidence on said issue to the state trial court for its

consideration. Therefore, this Court hereby GRANTS a Stay of Execution until noon February 21, 1992 or the time when Petitioner shall file his application with the state trial court, whichever occurs sooner.

In the event that this issue would not be found of sufficient grounds for granting a stay of execution, this Court, as an alternative and independent grounds for granting the stay, would note that Petitioner argues that he has not been provided a full and fair hearing as he alleges is constitutionally required since no evidentiary hearing was provided by the state trial court judge after he submitted some affidavits and this Court would therefore grant a stay pending the Fifth Circuit Court of Appeals opinion in May v. Collins, No. 91-6273 which raises similar issues as to when an evidentiary hearing is required where, as here, the evidence is also a claim of actual innocence and affidavits are involved.

The Court has considered the applicable legal standard enunciated in Sulvage v. Lynaugh, 842 F.2d 89 (5th Cir. 1988) in granting a stay as follows:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *O'Bryan v. McKaskle*, 729 F.2d 991, 993 (5th Cir. 1984); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982), cert. denied, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984); *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982).
>
> In a capital case "while the movant need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e. the other three factors] weighs heavily in the favor of granting the stay." *O'Bryan v. McKaskle*, 729 F.2d at 993 (quoting *Ruiz v. Estelle*, 666 F.2d at 856).
>
> *Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987), cert. denied, ___U.S. ___, 108 S.Ct. 6, 97 L.Ed.2d 796 (1987); see also *Streetman v. Lynaugh*, 835 F.2d 1521, 1524 (5th Cir. 1988) (emphasis added).

The Court finds that a stay in this case for the reasons stated in this ORDER and Memorandum of even date herewith is appropriate. It is THEREFORE,

ORDERED, ADJUDGED and DECREED that Petitioner's Motion for Stay of Execution be hereby GRANTED and that Petitioner's execution shall be STAYED until noon, February 21, 1992 or until the time Petitioner shall file his application with the state trial court on the constitutional claim of alleged actual innocence along with his evidence on said issue including his recently acquired evidence, whichever occurs first. In the event that the stay is not upheld on the prior grounds, this Court would grant, as an alternative and independent ground, a stay until the opinion of the Fifth Circuit Court of Appeals in May v. Collins No. 91-6273 would be handed down and this Court could determine its application to this case.

It is further ordered that the Clerk shall give immediate telephonic and telegraphic notice to James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, to the Honorable Ann Richards, Governor of the State of Texas; and to the Honorable Dan Morales, Attorney General of the State of Texas that Leonel Torres Herrera's execution is stayed by order of this Court. A certified copy of this Order shall be subsequently served

upon those persons by the United States Marshal.

The Clerk shall send a copy of this Order to Counsel for Petitioner and Counsel for Respondent.

Done this 17th day of February, 1992, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
Filed
FEB 18 1992
Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LEONEL TORRES HERRERA, Petitioner,	§	
v.	§	CIVIL ACTION NO. M-92-30
JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent.	§	

ORDER

Came on for consideration the Petitioner's "Motion to Alter and Amend Judgment and for Reconsideration of Orders Entered February 17, 1992" in which the Petitioner requests reconsideration of the Court's previous granting of the Respondent's Motion for Summary Judgment on the part of his first claim for relief which alleged constitutional Brady violations and the Court being of the opinion that same should be GRANTED and that the Court's previous statements and analysis on said issues in the portion of its previous Memorandum discussing said issues should be withdrawn as the Court is persuaded that there are sufficient factual and legal allegations under the applicable legal standards to necessitate an evidentiary hearing on this matter before this Court.

It is, therefore, ORDERED, ADJUDGED and DECREED that the

portion of the Court's previous Order granting Summary Judgment on the Petitioner's first claim alleging Brady violations is hereby withdrawn and this cause is set for an evidentiary hearing on the Petitioner's allegations in Claim for Relief Number I on Friday, February 21, 1992, before this Court at 10:00 a.m. in the 9th Floor Courtroom, 1701 West Business Highway 83, McAllen, Texas.

The Clerk shall send a copy of this Order to counsel for Petitioner and to counsel for Respondent.

DONE on this 18th day of February, 1992, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
FILED
FEB 18 1992
Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LEONEL TORRES HERRERA, Petitioner,	§	
v.	§	CIVIL ACTION NO. M-92-30
JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent.	§	

ORDER SUPPLEMENTING PREVIOUS ORDER STAYING EXECUTION

Petitioner Leonel Torres Herrera was found guilty of capital murder and given a sentence of death by the 197th Judicial District Court of Cameron County, Texas. A Motion for Stay of Execution and a Petition for Writ of Habeas Corpus, pursuant to Title 28 U.S.C. § 2254, was filed with this Court on Sunday, February 16, 1992. Petitioner is scheduled to be executed on Wednesday, February 19, 1992.

The Court by Order of even date herewith having GRANTED the Respondent's Motion to Reconsider its granting of Motion to Summary Judgment on the issue addressed in his First Claim for relief alleging constitutional Brady violations by Order of even date herewith and having set an evidentiary hearing on said issues for Friday, February 21, 1992 at 10:00 a.m. before this Court hereby GRANTS a Stay of Execution pending the resolution of said issues by this Court.

The Court has considered the applicable legal standard

enunciated in Selvage v. Lynaugh, 842 F.2d 89 (5th Cir. 1988) with regards to this claim in granting a stay as follows:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *O'Bryan v. McKaskle*, 729 F.2d 991, 993 (5th Cir. 1984); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982), cert. denied, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984); *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982).
>
> In a capital case "while the movant need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e. the other three factors] weighs heavily in the favor of granting the stay." *O'Bryan v. McKaskle*, 729 F.2d at 993 (quoting *Ruiz v. Estelle*, 666 F.2d at 856).
>
> *Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987), cert. denied, ___U.S. ___, 108 S.Ct. 6, 97 L.Ed.2d 796 (1987); see also *Streetman v. Lynaugh*, 835 F.2d 1521, 1524 (5th Cir. 1988) (emphasis added).

The Court finds that a stay in this case is appropriate. It is THEREFORE,

ORDERED, ADJUDGED and DECREED that Petitioner's Motion for Stay of Execution be hereby GRANTED and that Petitioner's execution shall be STAYED pending resolution by this Court of Petitioner's First Claim.

The Court notes that a previous Order granting a Stay of Execution was granted by this Court on February 17, 1992 and the reasons stated in the granting of this Stay of Execution are in addition to and independent to the reasons stated in said Order and shall supplement said Order.

It is further ordered that the Clerk shall give immediate telephonic and telegraphic notice to James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, to the Honorable Ann Richards, Governor of the State of Texas; and to the Honorable Dan Morales, Attorney General of the State of Texas that Leonel Torres Herrera's execution is stayed by order of this Court. A certified copy of this Order shall be subsequently served upon these persons by the United States Marshal.

The Clerk shall send a copy of this Order to counsel for Petitioner and counsel for Respondent.

Done this 18th day of February, 1992, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
FILED
FEB 18 1992
Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LEONEL TORRES HERRERA,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

CIVIL ACTION NO. M-92-30

ORDER

On the 18th day of February, 1992, came on to be considered the Petitioner's "Request for Certification Under Rule 54(B), and Application for Probable Cause to Appeal, For Leave to Appeal In Forma Pauperis on Appeal, and for Certification that Appeal is Taken in Good Faith." Having reviewed the motion in light of this Court's Memorandum and Order entered on February 17, 1992 denying the Second, Third, Fourth and Fifth Claims for Relief in Petitioner's Petition for a Writ of Habeas Corpus and this Court having today granted the Petitioner's Motion to Reconsider its previous granting of Respondent's Motion for Summary Judgment on the portion of Petitioner's First Claim alleging constitutional Brady violations, the Court renders the following ruling.

The Application for Certificate of Probable Cause is hereby GRANTED pursuant to 28 U.S.C. § 2253. In addition the Court hereby GRANTS the Petitioner's request for leave to proceed in forma pauperis on appeal and for certificate that his appeal is taken in

good faith and hereby pursuant to Rule 54(b) hereby enters Judgment Dismissing Petitioner's Claims for relief numbered 2, 3, 4 and 5 and this shall be a final appealable judgment on said issues.

The Clerk shall send a copy of this Order to counsel for Petitioner, and counsel for Respondent.

DONE this 18th day of February, 1992, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
FILED
FEB 17 1992
Jesse E. Clark, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LEONEL TORRES HERRERA,
Petitioner

VS.

JAMES A. COLLINS,
DIRECTOR, TEXAS DEPARTMENT
OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent

CIVIL ACTION NUMBER
M-92-30

MEMORANDUM

Came on to be considered before the Court the Petition for Writ of Habeas Corpus filed by Petitioner, Leonel Torres Herrera (hereinafter "Petitioner") pursuant to Title 28 U.S.C. § 2254, in which relief is sought from a finding of guilty and a sentence of death entered by the 197th Judicial District Court of Cameron County, Texas. Respondent, James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, filed "Respondent's Opposition to Request for Stay of Execution, Motion to Dismiss Pursuant to Rule 9(b) and Alternatively Motion for Summary Judgment and Supporting Brief."

Having considered the pleadings on file, the Court issues the following ruling on the Petition for Writ of Habeas Corpus and the Respondent's responses.

PROCEDURAL HISTORY

The Petitioner attacks a judgment of the 197th District Court of Cameron County, Texas, dated January 21, 1982, wherein he was convicted of capital murder by a jury and sentenced to death. Petitioner's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals. Herrera v. State, S.W.2d 313 (Tex. Crim. App. 1984) (en banc). Rehearing was denied by the Court of Criminal Appeals without written order on January 16, 1985. The United States Supreme Court denied certiorari. Herrera v. Texas, 471 U.S. 1131 (1985). Petitioner filed a Petition for Writ of Habeas Corpus in the 197th District Court of Cameron County, Texas, which entered an order recommending denial of the Writ. The Texas Court of Criminal Appeals denied Petitioner's state writ application. Ex Parte Herrera, No. 12848-02 (Tex. Crim. App. August 2, 1985).

A Petition for Writ of Habeas Corpus was then filed with this Court on August 7, 1985 and was subsequently denied. Petitioner filed Notice of Appeal and this Court granted a Certificate of Probable Cause. The Fifth Circuit Court of Appeals affirmed this Court's Judgment. Herrera v. Collins, 904 F.2d 944 (5th Cir. 1990). A Petition for Writ of Certiorari to the United States Supreme Court was denied. Herrera v. Collins, ____ U.S. ____, 111 S.Ct. 307 (1990).

The Petitioner subsequently filed a habeas corpus application in the state trial court. The state trial court entered findings of fact and conclusions of law on February 14, 1991 and recommended

that the writ be denied. The Petitioner's writ application was transmitted to the Texas Court of Criminal Appeals which denied all requested relief on the basis of the trial court's findings except one (declining to adopt the trial court's finding of procedural default on Petitioner's claim that the jury could not give effect to the punishment phase evidence) and vacated the stay of execution. Ex parte Herrera, 819 S.W. 2d 528 (Tex. Crim. App. 1991) (Clinton and Maloney, J.J., dissenting). The Petitioner sought rehearing which was subsequently denied. The Petitioner has, on December 17, 1991, filed a Petition for Writ of Certiorari to the United States Supreme Court and a Request for Stay of Execution on February 12, 1992, which are still pending. The state trial court has scheduled the Petitioner's execution for Wednesday, February 19, 1992.

Petitioner filed the instant Petition for Writ of Habeas Corpus with this Court on Sunday, February 16, 1992.

The Petition, which is the Petitioner's second federal habeas Petition, raises five claims for relief pursuant to Title 28 U.S.C. § 2254 as follows:

1. The State's failure to reveal exculpatory evidence resulted in the conviction and sentence of an innocent person, in violation of the Sixth, Eighth, and Fourteenth Amendments. Petitioner is innocent, another person has confessed to the crime, and the Petitioner's execution would violate the Eighth and Fourteenth Amendments.

2. Petitioner was tried and sentenced to death for the murder of two police officers by a jury whose members included a police officer detective in an office that investigated the case, in violation of the Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

3. During trial, recesses, and juror deliberations, juror-police officer Bressler was armed, and at least one juror noticed; in addition, and contrary to his sworn statements during voir dire, this officer knew one of the victims. These facts reveal that Petitioner's conviction and death sentence occurred in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

4. Petitioner's sentencer's were precluded from considering evidence which counseled in favor of a sentence less than death, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

5. The trial judge wrongfully refused to allow Petitioner to speak at all during Petitioner's trial and capital sentencing proceeding, thereby violating Petitioner's federal Constitutional rights.

Respondent, as previously stated, has responded to the claims for relief of Petitioner and in addition has filed a Motion to Dismiss pursuant to Rule 9(b) alleging abuse of writ and Motion for Summary Judgment.

FACTUAL BACKGROUND

The evidence at the trial revealed that on the evening of September 29, 1981, a Texas Department of Public Safety Officer, David Rucker (hereinafter "Rucker") was killed by a gunshot wound to the head. There were no witnesses to the shooting, but Petitioner's social security card was found near the body. Ten minutes later, approximately six miles from where Rucker's body was found, Enrique Carrisalez (hereinafter "Carrisalez") a Los Fresnos, Texas, city police officer, stopped a speeder travelling from the direction of the earlier shooting. As Carrisalez approached the stopped vehicle, the driver shot him in the chest. The officer died nine days later from the wound.

Carrisalez was accompanied by civilian Enrique Hernandez (hereinafter "Hernandez") who witnessed the shooting. Upon attempting to stop the vehicle, Carrisalez called in the license plate number of the car on the police radio. After the shooting, Hernandez radioed in a general description of the suspect's automobile. Immediately afterwards that night, Hernandez was interviewed by police officers.

On the next morning, Hernandez gave a statement to Texas Ranger Bruce Casteel. The police then proceeded to obtain an arrest warrant. On the morning of September 30, just hours after the shooting had occurred, Hernandez was called to the Harlingen police station and shown a display of photographs. From that display, he chose three photographs, one of which portrayed the Petitioner. The following afternoon, October 1, two police officers went to the hospital room of Carrisalez, showed him a single photograph of Petitioner, and asked him three times if he could identify it. Although he could not speak, Carrisalez nodded his head positively identifying Petitioner as the gunman. This same photograph was shown by itself to Hernandez later the same day, who also made a positive identification of Petitioner. The photograph was a mug shot that carried the notation "Edinburg Police Department" suggesting the person was already in custody.

Hernandez was shown another photographic display on October 6, 1981, two days after Petitioner had been taken into custody. At this showing, he positively identified Petitioner. Finally, on

October 24, Hernandez identified Petitioner from a five-man lineup attended by Petitioner's attorney.

Petitioner was arrested on October 4, 1981, and he was taken to the station for questioning. Following the arrest, police searched the Petitioner and found a letter written on the backs of several envelopes, wherein Petitioner discussed the death of both officers. After having been convicted of the capital murder of Carrisalez, Petitioner plead guilty to the murder of Rucker.

Petitioner in the present Petition, claims he is innocent of the murder of both officers and that his brother, Raul Torres, was the one who committed the murders and has offered several affidavits, including one of an alleged eyewitness, in support of his claim of innocence.

RESPONDENT'S MOTION TO DISMISS UNDER RULE 9(b)

Respondent moves to dismiss this case under Rule 9(b) of the Rules Governing Section 2254 cases in the United States District Court, which provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The abuse of writ doctrine generally "prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding." McCleskey v. Kant, ____ U.S. ____, 111 S.Ct. 1454, 1470, No. 89-7024 (April 16, 1991). In McCleskey, The Supreme Court applied the procedural default

standard to abuse of writ inquiries in the following manner:

> When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appeal for the first time and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions.
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> Federal courts retain the authority to issue the writ of habeas corpus in a further narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.

111 S.Ct. at 1470 citing Murray v. Carrier, 477 U.S. 478, 485, 106 S.Ct. 2639, 2643 (1986).

Respondent's pleadings sufficiently satisfy the burden imposed in order to plead abuse of writ. The burden shifts and Petitioner must meet the McClaskey standards in order to urge the five claims for relief now alleged. Guided by McClaskey, this Court must consider all of Petitioner's present claims under the procedural default standard. 111 S.Ct. at 1470.

Because the Court will address the abuse of writ and/or procedural default issues with regards to each one of the five claims for relief, the Court will proceed to discuss each claim below.

CLAIM I

THE STATE'S FAILURE TO REVEAL EXCULPATORY EVIDENCE RESULTED IN THE CONVICTION AND SENTENCE OF AN INNOCENT PERSON, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. PETITIONER IS INNOCENT, ANOTHER PERSON HAS CONFESSED TO THE CRIME, AND THE PETITIONER'S EXECUTION WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

In his first claim, the Petitioner presents allegations that maintain his actual innocence of the capital murder convictions. The Petitioner frames part of this claim as a violation of the constitutional principles enunciated in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Petitioner alleges, without proof of any evidence, that law enforcement officials knew of exculpatory evidence and withheld it from defense counsel at trial and sentencing. In the alternative he alleges he is innocent of the crime and his execution would violate the eighth and fourteenth amendments and an evidentiary hearing on this claim of innocence must be a full and fair one.

The Petitioner alleges he was not present when either of the two officers was killed. Petitioner avers he had nothing to do with either murder. To substantiate the claim, the Petitioner offers four affidavits. Affiant Hector J. Villarreal represented the Petitioner's brother Raul Herrera, on a charge of attempted murder. According to Villarreal, Raul Herrera confessed to him that he, not Petitioner, murdered both Rucker and Carrisales. Villarreal states that Raul Herrera was murdered in 1984. (See Appendix to Petition, No. 10).

Affiant Juan Franco Palacios states that he was a friend of Raul Herrera. Palacios states that on one occasion, when sharing a cell at the Hidalgo County Jail in 1984, Raul Herrera confessed that he murdered Rucker and Carrisales. (See Appendix to Petition, No. 11). Affiant Jose Ybarra, Jr., an old schoolmate of the Herrera brothers relates a similar confession. (See Appendix to Petition, No. 15). The most recent of the above mentioned affidavits was executed over a year ago and it appears that the Villarreal and Palacios affidavits were presented to the state trial court.

Raul Herrera's son, Raul Herrera, Jr., relates an eyewitness account of the murders in an affidavit executed within the last two weeks. (See Appendix to Petition, No. 16). Raul Herrera, Jr. states he was with his father on the date of the murders and that his father killed both Rucker and Carrisales. Affiant Raul Herrera, Jr. states that the Petitioner was not involved and was not present when the murders occurred. This affiant states that he told a police officer this account, but the officer told him never to repeat it. The affiant states no attorney representing the Petitioner asked him about the events until recently.

Although the state trial court considered a claim of newly discovered exculpatory evidence in the Villarreal and Palacios affidavits, the Petitioner complains the trial court summarily dismissed them without a hearing as being meritless. The Petitioner argues he was entitled to an evidentiary hearing by the trial court on this matter and is especially so entitled in light

of the latest affidavits. However, as already stated, two of the affidavits including the recent alleged eyewitness one have never been presented to the state trial court.

Although one of the Petitioner's complaints under this claim is as a constitutional Brady violation, the Petitioner fails to adequately demonstrate any evidence of withholding exculpatory material by the prosecution. To state a Brady claim, the Petitioner must demonstrate that '(1) the prosecution suppressed evidence that was (2) favorable to the accused and (3) 'material to either guilt or punishment.'" Cordova v. Collins, ___F.2d___, No. 92-2037, (5th Cir. 1992) citing Brady, 373 U.S. at 87. The affidavits offered as 'new evidence' as well as the newspaper articles to which Petitioner refers in this Appendix fail to make any showing that the prosecution even knew about this evidence. The affidavits come from people closely associated with the Petitioner or his brother. The Petitioner has failed to show the first prong of a Brady claim and thus no constitutional violation under Brady. Since this allegation contains evidence which was acquired after the first federal habeas petition in 1985 this Court will not use the abuse of writ standard but will grant the Respondent's Summary Judgment Motion on this issue.

With regard to the second portion of Petitioner's claim in which he claims actual innocence and constitutional violations of his eighth and fourteenth amendment rights thereto, the general rule is that if a petitioner presents a substantial allegation of newly discovered evidence, a federal habeas court must grant an

evidentiary hearing. Townsend v. Sain, 372 U.S. 293, 313; 83 S.Ct. 745, 757 (1963). A petitioner is entitled to an evidentiary hearing when the state court did not provide a full, fair, and adequate hearing. Id. However, newly discovered evidence bearing directly upon guilt or innocence is not properly presented in a petition for habeas corpus, unless the petition implicates a constitutional violation. Shaver v. Ellis, 255 F.2d 509 (5th Cir. 1958) and Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984) reh'g *denied, en banc* 747 F.2d 1468, *cert. denied* 470 U.S. 1088 (1985). As already stated, it is important to note that two of Petitioner's affidavits alleging his innocence including the very recent one of the alleged eyewitness have not been presented to the trial court.

This Court realizes that the Petitioner's execution is imminent and feels that, in order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process, he should be afforded an opportunity to present his constitutional claim of alleged actual innocence along with his evidence including his recently acquired evidence on said issue to the state trial court and that the state court should be afforded the opportunity to consider said issues.

The Court realizes the state court is normally bound by a "rule of habeas abstention" preventing the state court from considering the merits of a habeas petition when a federal habeas proceeding is pending on the same matter. See May v. Collins, 948 F.2d 162, 169 (5th Cir. 1991) cert. *denied* 60 U.S.L.W. 3479 (U.S. 1992). As stated, the Court is also cognisant of the time

constraint faced by Petitioner. The Court believes the prudent course here is for this Court to grant the Petitioner's stay of execution request and for this Court to retain jurisdiction of the portion of Petitioner's first claim in which he alleges he is actually innocent and that his execution would violate his eighth and fourteenth amendment rights until noon, February 21, 1992 at which time the Court shall DISMISS said claim without prejudice provided Petitioner shall have filed by then an appropriate application with the state trial court with his constitutional claim of alleged actual innocence along with his recently acquired evidence on said issue. Said DISMISSAL shall be sooner and shall take effect at the time of filing of said state application if same be filed sooner.

In the event that this issue would not be found of sufficient grounds for granting a stay of execution, this Court, as an alternative and independent grounds for granting the stay, would note that Petitioner argues that he has not been provided a full and fair hearing as he alleges is constitutionally required since no evidentiary hearing was provided by the state trial court judge after he submitted some affidavits and this Court would therefore grant a stay pending the Fifth Circuit Court of Appeals opinion in May v. Collins, No. 91-6273 which raises similar issues as when an evidentiary hearing is required where, as here, the evidence is also a claim of actual innocence and affidavits are involved.

CLAIM II

PETITIONER WAS TRIED AND SENTENCED TO DEATH FOR THE MURDER OF TWO POLICE OFFICERS BY A JURY WHOSE MEMBERS INCLUDED A POLICE OFFICER DETECTIVE IN AN OFFICE THAT INVESTIGATED THE CASE, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM III

DURING TRIAL, RECESSES, AND JUROR DELIBERATIONS, JUROR-POLICE OFFICER BRESSLER WAS ARMED, AND AT LEAST ONE JUROR NOTICED; IN ADDITION, AND CONTRARY TO HIS SWORN STATEMENTS DURING VOIR DIRE, THIS OFFICER KNEW ONE OF THE VICTIMS. THESE FACTS REVEAL THAT PETITIONER'S CONVICTION AND DEATH SENTENCE OCCURRED IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In Claims II and III, which will be discussed together, Petitioner claims his sixth, eighth and fourteenth amendment rights were violated as a result of the service of Brownsville Police Detective Joseph J. Bressler (hereinafter, Bressler) as a juror in his case. Some conclusory statements are made about the service of three other jurors (two of whom were relatives of police officers and another an acquaintance of Rucker) but the two claims are worded on the service of Bressler.

The gist of the Petitioner's complaint as to Bressler's service appears to be centered on mere speculation on the Petitioner's part unsubstantiated by any evidence or law. The Petitioner complains that the service of Bressler created an appearance of unfairness and caused someone to serve who was automatically biased and would believe law enforcement officials and in addition created a constitutionally impermissible risk that a sentence of death would be imposed. In addition, Petitioner

presents an affidavit with hearsay evidence that a juror (who has refused to sign an affidavit to that effect) had indicated to an investigator for Petitioner that Bressler was armed during the proceedings and had known Rucker although during voir dire he claimed he did not. (See, Appendix to Petition No. 13). An additional hearsay affidavit has been filed alleging that another juror had stated that Bressler, at the start of jury deliberations, expressed his view that the Petitioner was guilty and had stated facts about Petitioner that were not in evidence and that his views had an influence on her decision. Said juror has also refused to sign such an affidavit and, in fact, when requested to do so, stated that she would not sign such an affidavit as it was not true. (See, Appendix to Petition No. 14).

The Petitioner argues that, although the trial court alleged these claims were procedurally defaulted, the Petitioner properly presented them to the court which ruled on their merits. The Petitioner further asserts these claims implicate a fundamental miscarriage of justice and should not be dismissed before consideration on the merits. This Court finds that Petitioner has not established cause and prejudice under either procedural default or abuse of writ. The Court further finds that these claims do not implicate a fundamental miscarriage of justice as they do not embrace constitutional violations resulting in the conviction of one actually innocent of the crime or sentence.

The Petitioner's trial counsel moved for a mistrial based, in part, upon Petitioner's dissatisfaction with the selection of

Bressler and the other three as jurors. Trial Record, vol. 12, p. 3. However, the trial court in the most recent state habeas petition, specifically found that the Petitioner was procedurally barred from making these claims, as trial counsel made no direct challenge for cause to Bressler but rather simply asked for an additional preemptory challenge. Ex Parte Herrera, No. 71,171, Amended Order of February 14, 1991. The Court of Criminal Appeals found the trial court's conclusions were supported by the record. Ex parte Herrera, 819 S.W.2d 528 (Tex.Crim.App. 1991).

The Court similarly finds that the Petitioner has not established cause for failure to raise these claims in his earlier federal petition. Unquestionably, all of the facts surrounding Bressler's selection and service upon which Petitioner now bases his second and third claims, became known during jury selection and as to any which were not Petitioner has not shown cause as to why they were not discovered before the Petitioner filed his first federal habeas Petition in 1985. The same applies as to any complaints about the other three jurors. In short, nothing prevented Petitioner from raising Claims II and III earlier. Petitioner fails to offer any evidence to aid in establishing cause.

The Petitioner seeks to skirt these impediments by asserting Claims II and III are not barred as they involve a fundamental miscarriage of justice. The Court questions whether the Petitioner has even identified a constitutional violation which would lead to the conviction of an innocent person here as required by McCleskey.

While Petitioner states his sixth, eighth and fourteenth Amendment rights were violated, the Court as previously noted has not been cited anything in law or evidence other than speculation and conclusion that would lead to the conclusion of any constitutional violation.

In addition, Petitioner has not indicated that he has any evidence, hearsay or otherwise, that even if Bressler did carry a gun during his service as a juror, it affected any other juror, nor has he presented other than hearsay any evidence to the effect that Bressler did know Rucker contrary to his own sworn statement during voir dire and that even if he did it affected any juror's decision.

Petitioner, having failed to satisfy the McCleskey standard as to Claims II and III, must have said claims dismissed as an abuse of writ.

CLAIM IV

PETITIONER'S SENTENCER'S WERE PRECLUDED FROM CONSIDERING EVIDENCE WHICH COUNSELED IN FAVOR OF A SENTENCE LESS THAN DEATH, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In this fourth claim for relief, Petitioner asserts, under Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989) that: (1) the jury was precluded from considering mitigating circumstances which were in evidence; and, (2) other, available evidence was not presented because of counsel's understanding of the Texas capital sentencing scheme. He argues that had the jury been able to consider this evidence beyond the scope of the two special issues on deliberateness and future dangerousness, it could have imposed

a life sentence. Therefore, Petitioner argues, the Texas statute was applied in violation of his sixth, eighth and fourteenth amendment rights. The Respondent argues that raising this issue in this second federal habeas petition as opposed to raising it in the first federal habeas petition in 1985 constitutes abuse of the writ and under Rule 9(b) the claim should be dismissed.

Petitioner asserts evidence of his military service, his remorse, his mental instability, his substance abuse, his caring family, and police brutality after his arrest is supported by the record. While conceding that this evidence could have been considered under the special issues of the Texas capital sentencing scheme, the Petitioner claims the special issues allowed only an aggravating effect upon future dangerousness.

Petitioner also contends evidence such as psychological evaluations were not pursued because of trial counsel's understanding of the effect to be given mitigating circumstances under the special issues. Petitioner alleges counsel believed any such evidence would only contribute to affirmative answers on the special issues. As a result, counsel did not bring evidence of an abusive father, head injuries, and untreated illnesses to the jury. The Petitioner has recently secured a psychological evaluation which asserts the Petitioner suffered from neurological impairment and Post Traumatic Stress Disorder (See, Appendix to the Petition No. 9).

As stated previously, McCleskey held that Rule 9(b) provides that a second or successive petition for federal habeas relief

which raises claims that could have been raised in an earlier federal habeas petition should be dismissed unless the Petitioner can demonstrate both cause for his failure to present the claim in the earlier petition and resulting prejudice. The McCleskey Court went on to say that a petition may make a valid cause showing where a particular legal theory was not yet a viable option for the Petitioner.

Petitioner argues that his pre-Penry belief that courts had correctly interpreted the Texas capital punishment statute and that presentation of evidence as to the Petitioner's mental incapacities and other alleged mitigating circumstances would only support a 'Yes' in response to the special issues presented to the jury for consideration, is cause for the Petitioner's failure to raise this claim earlier.

There is no merit to the Petitioner's argument that his understanding of the law prior to Penry explains his failure to make this claim previously in his 1985 federal habeas petition.

The Fifth Circuit in Cuevas v. Collins, 932 F.2d 1070, (5th Cir., 1991) found that Penry claims have been made since 1980 when the Texas Court of Criminal Appeals found that there was no need for an explanatory jury charge with regard to the consideration of mitigating evidence during the sentencing phase of a capital murder trial. Quinones v. State, 592 S.W.2d 933, 947 (5th Cir. 1980). The Fifth Circuit held,

> [i]n Selvage v. Lynaugh, 842 F.2d 89, 94 (5th Cir. 1988), we found that as early as April 1980, a "Penry" contention, as it later became known, was "not a recently found legal theory not knowledgeable by competent

> counsel". . . . There is no basis for asserting that it would have been futile for Cuevas to have pursued his Penry claim in his first federal habeas petition. He did so in the federal district court but abandoned the argument on appeal. Nor is the fact that the law is "developing" of aid to Cuevas. The "question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 477 U.S.527, 106 S.Ct.2661, 2667, 91 L.Ed.2d 434 (1986).

Cuevas at 1082.

Thus, Petitioner's argument that the law in 1985, when Petitioner could have included this claim with his first federal habeas petition, did not provide for a viable Penry claim, must fail as Petitioner has failed to show any cause for failure to have raised these issues then.

The Petitioner alternatively argues that to bar his Penry claim may give rise to a viable fundamental miscarriage of justice claim. The Court is cognizant that the type of cases where a fundamental miscarriage of justice would apply is in "extraordinary instances where a constitutional violation has caused the conviction of one innocent of a crime." McCleskey, at 1470.

The Supreme Court has extended the term "innocent of a crime" to include cases where one would be "innocent" of a death sentence. As the Supreme Court stated in Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211, 1217 n.6 (1989):

> In Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 2650, 91 L.Ed.2d 397 (1986), this Court stated that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." We made clear, however, that such a case would be an "extraordinary" one, ibid., and have since

> recognized the difficulty of translating the concept of "actual" innocence from the guilt phase to the sentencing phase of a capital trial. Smith v. Murray, 477 U.S. 527, 537, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986). We do not undertake here to define what it means to be "actually innocent" of a death sentence.... Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received.

This Court has faced this issue before in Bird v. Collins, in a case where the petitioner was alleging evidence of psychological, sociological and mental condition which he claimed made him innocent of the death sentence and granted a stay pending oral argument on this issue. The Fifth Circuit in Bird v. Collins, 943 F.2d 629 (5th Cir. 1991) at p. 630 vacated this Court's decision to stay the execution pending oral argument and stated as follows:

> The district court hesitated over the expressed uncertainty of the Supreme Court in translating the concept of actual innocence to innocence of a death sentence. The district court quoted from *Smith v. Murray*, 477 U.S. 527, 539, 106 S.Ct. 2661, 2884, 91 L.Ed.2d 434 (1986) that:
>
> > We do not undertake here to define what it means to be "actually innocent" of a death sentence.... Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case." [*Murray v. Carrier*, supra. 477 U.S. [478] at 496, 106 S.Ct. [2639], at 2650, [91 L.Ed.2d 397 (1986)], into an all too ordinary one.

We recently acknowledged this uncertainty in *Cuevas v. Collins*, 932 F.2d 1078 (5th Cir. 1991). However we also concluded that whatever may be the "extraordinary" level of *Penry* type evidence not given expression under the

question of deliberateness and future dangerousness sufficient to render a petitioner "actually innocent" of a sentence as opposed to error that "might have affected [its] accuracy", it was not presented by Cuevas. We reach the same conclusion here.

This Court, therefore, notes that here as in Bird whatever the extraordinary level of Penry type evidence not given expression under the questions of deliberateness and future dangerousness sufficient to render a Petitioner actually innocent of a sentence as opposed to error that might have affected its accuracy is not present and therefore this claim must be dismissed as an abuse of writ.

CLAIM V

THE TRIAL JUDGE WRONGFULLY REFUSED TO ALLOW PETITIONER TO SPEAK AT ALL DURING PETITIONER'S TRIAL AND CAPITAL SENTENCING PROCEEDING, THEREBY VIOLATING PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS.

The Petitioner contends he was restrained by the trial court from exercising any constitutional rights. The Court, responding to an outburst by Petitioner, instructed him not to disrupt the proceedings or the court would have him placed in an observation room. Petitioner now protests, without any evidentiary support, that this action rendered him effectively mute and unable to participate in his defense.

The Petitioner derives this claim from events readily discernible in the record. As already stated, at one point during voir dire, the Petitioner spoke out, complaining of the proceedings. The trial court ordered that he be placed in the

observation room where he could see and hear the proceedings without being disruptive. This transpired before a noon recess. Trial Record, vol. 10, p. 61-63. After reconvening, with the Petitioner apparently back at counsel's table, the court again cautioned him not to be disruptive or he would return to the observation room. The court noted it was in the Petitioner's interests to be able to consult with counsel. The Petitioner acknowledged comprehension of the court's warning. Trial Record, vol. 10, p. 66-67. The Petitioner points to no other occasion in which he was removed to the observation room nor where he was prohibited from consulting with counsel.

As stated previously, the Court in McCleskey held that Rule 9(b) provides that a second or successive petition for federal habeas relief which raises claims that could have been raised in an earlier federal habeas petition should be dismissed unless the petitioner can demonstrate both cause for his failure to present the claim in the earlier petition and resulting prejudice.[1] The Petitioner directs this Court to nothing that would demonstrate cause for failure to have previously raised this issue. As previously noted, the facts serving as the basis for this claim were clearly ascertainable from the Trial Record. Therefore,

[1] The Court recognizes that this claim is also procedurally barred. The Texas Court of Criminal Appeals found that the trial court's findings of fact and conclusions of law as to this claim, in which the trial court found error was not preserved, were supported by the record. Ex Parte Herrera, 819 S.W.2d 528 (Tex. Crim. App. 1991). The cause and prejudice standard still applies. Petitioner fails to demonstrate cause for failure to preserve error.

Petitioner's only door to relief on this claim hinges on whether this claim implicates a fundamental miscarriage of justice. See McCleskey at 1470.

The Court finds nothing in this claim implicating a fundamental miscarriage of justice. The Petitioner identifies no constitutional violation in this claim which "probably has caused the conviction of one innocent of the crime." McCleskey, id. The Court appreciates an accused's basic right to be present in the courtroom during all stages of a trial under the Sixth Amendment. However, this right does not allow a defendant to disregard proper courtroom decorum nor to disrupt the conduct of trial proceedings. As the Supreme Court stated in Illinois v. Allen, 397 U.S. 337, 343; 90 S.Ct. 1057, 1060-1061 (1970) *reh'g denied*, 398 U.S. 915, 90 S.Ct. 1684 (1970).

> Although mindful that courts must indulge every reasonable presumption against loss of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

In Petitioner's trial, he was briefly placed in an observation room and allowed to return, enabling him to participate in his defense. The Petitioner points to nothing which demonstrated a constitutional violation. Therefore, this claim constitutes an

abuse of writ and should be dismissed.

REQUEST FOR EX PARTE HEARING FOR EXPERTS AND INVESTIGATORS

Nothing in the Petition indicates the necessity of this Court holding an ex parte hearing of the appointment of experts and investigators for Petitioner.

CONCLUSION

For the foregoing reasons the Court is of the opinion that the Respondent's Motion to Dismiss pursuant to Rule 9(b) should be GRANTED as to Petitioner's claims for relief Numbers II, III, IV and V. The Court is further of the opinion that the Respondent's Motion for Summary Judgment as to the portions of Claim Number I, which relies on constitutional Brady violations should be GRANTED and that the Court should retain jurisdiction of the remaining portion of Petitioner's Claim Number I in which he alleges he is actually innocent and his execution would violate his eighth and fourteenth amendment rights until noon, February 21, 1992 at which time this Court will DISMISS said claim without prejudice provided Petitioner shall have filed by then the appropriate application with the state trial court with his constitutional claim of alleged actual innocence along with his evidence including his recently acquired evidence on said issue. If same be filed sooner said DISMISSAL shall take effect at the time of filing of said application. In the event that this issue would not be found of sufficient grounds for granting a stay of execution, this Court, as an alternative and independent grounds for granting the stay,

would note that Petitioner argues that he has not been provided a full and fair hearing as he alleges is constitutionally required since no evidentiary hearing was provided by the state trial court judge after he submitted some affidavits and this Court would therefore grant a stay pending the Fifth Circuit Court of Appeals opinion in May v. Collins, No. 91-6273 which raises similar issues as when an evidentiary hearing is required where, as here, the evidence is also a claim of actual innocence and affidavits are involved. The Court is also of the opinion that in order to accomplish this the Motion for Stay of Execution should be GRANTED as per the order of even date herewith.

The Clerk shall send a copy of this Memorandum to counsel for Petitioner and counsel for Respondent.

Done this 17th day of February, 1992 at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

APR 9 1992

No. 91-7328

In The

Supreme Court of the United States

October Term, 1991

LEONEL TORRES HERRERA,

Petitioner,

v.

JAMES A. COLLINS, Director, Texas Department of Criminal Justice,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed February 19, 1992
Certiorari Granted February 19, 1992

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IN THE DISTRICT COURT OF
CAMERON COUNTY, TEXAS
197TH JUDICIAL DISTRICT

CAUSE NO. 81-CR-672-C

EX PARTE:
LEONEL TORRES HERRERA,
APPLICANT

AMENDED ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS

The Defendant in this cause filed his Application for Writ of Habeas Corpus December 12, 1990. The State filed a response December 28, 1990.

On January 2, 1991, the Court entered its order that such Application for Writ of Habeas Corpus be transmitted to the Texas Court of Criminal Appeals for that Court's consideration. T. p. 120.

The State having now filed proposed findings of fact and conclusions of law should be made and entered:

The Order on Application for Writ of Habeas Corpus entered herein January 2, 1991, T. p. 120, is hereby withdrawn and in its stead the Court makes the following Findings of Fact and Conclusions of Law and Order upon the Application of Writ of Habeas Corpus of Leonel Torres Herrera:

FINDINGS OF FACT

1. Applicant, Leonel Torres Herrera was indicted for and convicted for the offense of Capital Murder herein.

After the Jury affirmatively answered the Special Issues the Court assessed punishment at death.

2. Employed trial counsel was James S. Bates. At the time of this trial Bates had been engaged in the practice of law for thirty-two years. A former District Attorney of Hidalgo County, Texas, and State Senator, Bates was a skilled and experienced trial lawyer regularly engaged in the defense in major felony cases throughout South Texas, including ten or more in this Court. Senator Bates has since died.

3. On appeal Applicant's conviction was affirmed. *Herrera v State* 682 S.W. 2d 313 (Tx.Cr.App. 1984) Cert. Den., 471 US 1131 (1985).

4. Appellate counsel by employment was Will Gray, a skilled and experienced lawyer with extensive experience in the appeal of Capital cases.

5. A subsequent Writ of Habeas Corpus authored by Gray was denied by the Court of Criminal Appeals and U.S. District Court, Ricardo Hinojosa, J. The unpublished October 23, 1989, memorandum of Judge Hinojosa is ordered made part of this supplemental transcript.

6. The action of the U.S. District Court was affirmed by the United States Court of Appeals for the Fifth Circuit, June 25, 1990. *Herrera v Collins* 904 Fed. 2d 944 (5th Cir. 1990) cert.den. Oct 15, 1990

7. Attorney Gray represented Appellant in a subsequent trial where Appellant ultimately plead guilty to the murder of the second officer, DPS Trooper Rucker.

8. On direct appeal Applicant urged eight grounds of error, none of them remotely related to or suggestive of the Claims for Relief he now urges.

9. Applicant's first Application for Writ of Habeas Corpus sought relief on the grounds of impermissable identification, erroneous admission of a dying declaration and ineffective assistance of counsel. Nothing there raised was remotely related to or suggestive of the claims for relief he now urges.

Claim I

10. As to jurors Mike Guajardo, Ashton L. Barefoot and Daisy May Hanks: Applicant made no challenge for cause, and indeed, raised no obligation to their being seated as jurors, R.Vol IX pp 101, 137 and 156.

11. Applicant did not challenge Juror Joseph J. Bressler for cause. He made no obligation when the juror was seated, but did ask that he be granted an additional preemptory challenge (having been granted four additional challenges previously) because of the "expressions" and "feelings" of his client. R.Vol IX 120

12. As the indictment was about to be read to the jury, Applicant made his only mention in trial of jurors Guajardo, Barefoot, Hands and Bressler in an oral motion for mistrial. Referring to the four jurors counsel again made no suggestion they were subject to challenge for cause nor request they be removed from the jury saying only "the Defendant personally feels that the selection of (the jurors . . . were (sic) wholly unfair and unjust, as far as he is concerned". The motion then sought a mistrial be

granted so that Applicant be given "enough time to get an attorney acceptable to him and in whom he has faith and confidence". R.Vol XII pp 3 and 4.

13. Petitioner's first claim for relief was never urged in the trial Court (except as set out above) and it was not raised on direct appeal or in his subsequent petition for writ of habeas corpus.

Claim II

14. Applicant's claim that Juror Bressler was armed while on jury duty, or made statement contradictory to one made by him on voir dire, is premised solely upon an affidavit of hearsay by an employee of Applicant's present counsel.

15. Nothing at the trial or in its record remotely suggests that Applicant's second claim has any basis in fact.

16. Claim II was never raised in the trial Court, urged on direct appeal or thereafter.

Claim III

17. At trial Applicant did not take the stand and there was no evidence offered concerning the Applicant personally, past or present mental or physical health, life history, military service, childhood substances, criminal record or employment. Indeed the record is bereft of even so much as his age.

18. Applicant elected to offer no evidence at trial "which counselled in favor of a sentence less than death". The entirety of his evidence was showing of the absence

of fingerprints on the involved vehicle and post arrest injuries sustained by him in a scuffle with officers after he struck an Assistant District Attorney.

19. The "*Penry*" type mitigation evidence" expounded upon at length in this petition was not proferred at trial. No attempt is made now to explain why trial counsel elected not to do so at a trial two years after the *Penry* claim was preserved in 1980. See *King v Lynaugh*, 868 F 2d 1400, 1403 (5th Cir.1989)

20. At trial Applicant made no objection to the Charge on Punishment as given, nor did he request additional or different instructions. No explanation is offered now to explain why trial counsel elected not to do so at a trial two years after counsel preserved the *Penry* claim in 1980. See *King supra*.

21. Applicant made no objection to the Sentencing Procedure of Art. 37.07 C.C.P. as having an "unconstitutionally preclusive effect", or that it precluded the jury's consideration of mitigating evidence offered as the basis for a sentence less than death, or that it failed to guide the jury in its consideration of mitigating evidence. Neither did he urge these contentions on direct appeal in 1984 or in a subsequent petition for writ of habeas corpus in 1985 long after the *Penry* and *Franklin* claims were preserved in 1980 and 1982 respectively.

22. Applicant did not object at trial that the Court's punishment charge did not included "mitigation instructions", failed to adequately inform the jury of the consequences of their answer, or that it did not define certain depositive terms not defined by Texas statute. Neither did he urge these deficiencies on appeal or afterwards.

23. The bottom line is that Applicant's third claim *en toto* is here raised for the first time in his second petition for a writ of habeas corpus and without good cause explanation why it was not urged at trial, on direct appeal, or in his subsequent petition for writ of habeas corpus throughout the years 1982-1989.

Claim IV

24. As voir dire was being completed the Defendant suddenly stood and shouted: "I do not consider this a trial. I consider this a lynching party. That is the way I feel." Told by the Court he must not disrupt the trial, the Defendant replied "I already have". At this point the Court had the Defendant moved into a "cry room" opening into the courtroom but separated by a large glass window where occupants can see and hear all courtroom proceedings but cannot be heard in the courtroom. R Vol X pp 61.

25. Applicant remained in the observation room for about fifteen to twenty minutes until the noon recess. The proceedings had while he was in the observation room are set out at R. Vol X pp61-65.

26. When Court reconvened after lunch Applicant was back at the counsel table and remained throughout the trial. On his return the Court admonished him it would not allow the Court to be disrupted, and if he attempted to stand or speak, he would again be returned to the observation room.

27. Applicant understood the Court's prohibition was to disruptive outbursts, as evidenced by the fact that he

freely conversed with his counsel and guards throughout the trial and never appeared inhibited by the Court's choice of words.

28. Applicant made no objection at trial to the Court removing him to the observation room nor to the Court's instructions upon his return, nor did he raised this matter on direct appeal or otherwise until now.

CLAIM V

29. Closing arguments were not reported. No request was made that they be reported and no objection made that they were not being reported. R.Vol XII p. 12

30. No objection were made nor instructions requested as to closing arguments.

31. Applicant's imaginative errors he speculates may have been in the prosecutor's closing arguments are here raised for the first time.

CLAIMS VI AND VII

32. Applicant made no objection at trial to the State's questions and remarks in voir dire that he now finds improper.

33. Applicant made no request the Court otherwise instruct the jury or strike the State's reference to "life subject to the rules of pardons and parole".

34. The claimed errors in the prosecutor's voir dire questions and remarks are here raised for the first time in his second petition for writ of habeas corpus.

CLAIM VIII

35. There was no evidence at trial remotely suggesting that anyone other that Applicant committed the offense. Judge Campbell observed: " . . . we find all other evidence of appellate's identification as the perpretrator of the offense to be overwhelming". *Herrera v State*, 682 SW 2d 313, 320.

36. At a subsequent trial for the murder of the second officer, after Applicant stated in open Court that he had killed DPS Trooper Rucker, he answered that he was the driver of the automobile stopped by Patrolman Carrizales, which action of Carrizales cost him his life at the hands of such driver seconds later.

CONCLUSIONS OF LAW

1. There are no previously unresolved issues of fact material to the legality of Applicant's conviction and execution. Therefore an evidentiary hearing is necessary.

2. Applicant is procedurally barred from asserting error to the inclusion if Guarjardo, Barefoot, Hanks and Bressler on his jury having made no challenge for cause or valid objection to them at trial, made no such complaint on direct appeal and is now urges [sic] this ground of relief for the first time in a second petition for writ of habeas corpus.

3. Applicant's second claim as to "newly discovered evidence" of juror misconduct premised, as it is, entirely on the supposed truth of hearsay is without merit.

4. Applicant elected to offer no "mitigation" evidence at trial. He was not precluded from presenting such evidence nor was the jury precluded from giving consideration to it.

5. Because Applicant failed to offer any *Penry* type "mitigation evidence" at trial he is procedurally barred from here urging his Claim III.

6. Because Applicant did not object to the charge on punishment or request any additional instructions at trial and did not complain on direct appeal, Applicant is procedurally barred from now for the first time complaining that such charge failed to include certain instructions concerning mitigation evidence; failed to adequately inform the jury concerning the consequences of "Yes" and "No" answer to the special issues; and did not include definitions of certain terms.

7. Having lodged no obligation to the sentencing procedures at the time of trial, on direct appeal; or in his first writ petition, Applicant is procedurally barred from complaining that the sentencing procedure of Art. 37.071 is unconstitutional as precluding the jury's consideration of mitigating evidence.

8. Applicant is procedurally barred from asserting his perceived error in the Court's temporarily placing Defendant in an observation booth, and afterwards admonishing him, not having made objection at trial and failing to urge this complaint on direct appeal or thereafter.

9. Applicant is procedurally barred from now complaining of imagined errors in argument after failing to object at trial or to seek review on direct appeal or thereafter.

10. Applicant is procedurally barred from asserting errors as to prosecutor's voir dire questions and remarks when Applicant made no objection at trial and failed to urge such a claim on direct appeal or thereafter.

11. Applicant's "newly discovered evidence" as to the guilt of another based solely on hearsay is without merit.

12. Applicant has failed to demonstrate that his conviction was improperly obtained; but, he has affirmatively demonstrated, and this Court expressly finds, he is procedurally barred from advancing his present eight claims. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

The Clerk is ordered to prepare a Supplemental Transcript containing this Order, proposed findings of fact and conclusions of law filed herein, the October 23, 1990, Memorandum of U.S. District Judge Hinojosa, and any other supplemental filings herein. the Clerk will deliver the Supplemental Transcript to the Court of Criminal Appeals as provided by Art. 11.07 of the Texas Code of Criminal Procedure.

Signed the 14th day of January, 1991.

/s/ Illegible
Judge Presiding

IN THE TEXAS COURT OF CRIMINAL APPEALS

TC-91-21-179

EX PARTE LEONEL TORRES HERRERA

NO. 71.171 Habeas Corpus Application
From CAMERON County

OPINION

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

On January 20, 1982, applicant was found guilty of the offense of capital murder. After the jury returned affirmative answers to the special issues, punishment was assessed at death. This Court affirmed applicant's conviction on direct appeal. Herrera v. State, 682 S.W.2d 313 (Tex. Cr. App. 1984).

On January 17, 1991, this Court ordered the instant cause filed and set on applicant's third allegation. In that allegation, it is urged the jury in applicant's capital murder trial was precluded from considering evidence which "counseled in favor" of a sentence less than death, in violation of applicant's Sixth, Eighth and Fourteenth Amendment rights. The trial court has entered findings of fact and conclusions of law and recommended the relief sought be denied.

This Court has reviewed the record with respect to the allegation presented by applicant and finds that the findings and conclusions entered by the trial court are

supported by the record and upon such basis the relief sought is denied.[1]

PER CURIAM

Delivered: May 29, 1991
En banc

DISSENTING OPINION

The evidence listed in the application for writ of habeas corpus is evidence that would have been harmful to the defendant if offered at trial without instructing the jury that it could consider and give effect to mitigating evidence by declining to impose the death penalty. A request for such an instruction would have been futile at the time this case was tried. *See* Stewart v. State, 686 S.W.2d 118 (Tex.Cr.App. 1984).

I do not believe that counsel was incompetent because he did not proffer the evidence listed in the application at the time of trial. Strickland v. Washington, 466 U.S. 648, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The machinery in place at the time of this trial militated that competent counsel not proffer "two edged sword" *Penry* type evidence since it conceivably might have been utilized by the State; but without directions to the jury in accordance with the instruction mentioned above. Penry

---

[1] We specifically decline to adopt conclusion of law No. 6 entered by the trial court concerning applicant's alleged procedural default. See Black v. State, ___ S.W.2d ___ (Tex.Cr.App. No. 69,648, delivered this day). Applicant's remaining seven allegations are denied on the basis of the findings are conclusions entered by the trial court.

v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The Texas scheme of submitting the statutory issues to the jury on whether the defendant should receive death under Article 37.071, V.A.C.C.P., has never provided and still does not provide a mechanism for the jury to consider *Penry* type evidence in mitigation of the death penalty (evidence that goes beyond the scope of the statutory issues); an issue that would allow the jury to make an individualized assessment of the defendant and a "reasoned moral response" about the appropriateness of the death penalty where such evidence exists.

Until today, neither this Court nor the legislature has required that the trial courts of this State submit such an issue, despite the warnings, albeit sometimes clouded, suggested by Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1975); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 Whether any or all of these categories reflect true *Penry* evidence is a question we need not address here, although unquestionably at least some of them do. For in any event, by my reading of the trial record, none of these categories is substantiated by evidence sufficient to invoke a reasoned moral response of leniency. In short, I do not believe evidence was presented having mitigating significance beyond the Article 37.071(b), V.A.C.C.P., special issues. Thus I cannot conclude that applicant has been sentenced to death in contravention of the Eighth Amendment. See Gribble v. State, ___ S.W.2d ___ (No. 70, 773, delivered November 14, 1990) (Slip op. at 17).

However, applicant also claims that the Texas capital sentencing scheme prevented him from adducing substantial mitigating evidence. In the course of argument he drops a footnote in which he somewhat tentatively advances a Sixth Amendment ineffective assistance of counsel claim for failure of counsel to investigate and develop this evidence at applicant's trial. In an appendix to his writ application he documents what seems to me evidence of substantial mitigating potential that could have been tendered at the time of trial but was not. This evidence takes two forms: (1) affidavits of members of applicant's family documenting his history of abuse, his mental instability and his drug addiction; and (2) a psychologist's report. There is also an affidavit from applicant's only surviving trial counsel explaining why this evidence was not sought out at the time of trial.

Family Affidavits

There are affidavits from applicant's mother, his sister-in-law, his common-law wife, and two sisters. In synthesis, they tell the following grim story.

Applicant's father was a violent alcoholic who regularly beat applicant's mother "black and blue." When she was pregnant with applicant, he was known to have kicked her in the stomach. Applicant was an asthmatic child who suffered from scarlet fever and chronic headaches. Unable to afford a doctor, applicant's mother treated him with home remedies. Applicant would try to protect his mother from his father's abusive outbursts, and would endure beatings from his father as a consequence, often punched mercilessly about the head and

face. Applicant excelled in sports, but had a tendency to suffer head injuries. Once he was accidentally knocked unconscious with a baseball bat.

Applicant dropped out of high school and joined the Navy in 1967. He spent the next two years on a ship somewhere off the coast of Vietnam, and purportedly "saw combat." He was clearly traumatized by his experience, but would not talk about it to others, at least "not in any kind of way that [people] could understand." He returned from Vietnam a changed and paranoid man, "and if you asked him about who might come after him, all he would tell you was that it was the people who had seen what happened during the war." He sometimes lapsed into a glassy-eyed trance-like state, and would talk nonsense until he could be brought out of it.

After Vietnam, applicant took a common-law wife and started a family. At first he was a "loyal" family man. He and his brother started a business together running a convenience store. But when one of his daughters was born prematurely and spent a month in the hospital, with expenses mounting up, applicant became depressed.

Meanwhile applicant's father was in an auto accident and recovered "a tremendous amount of money" in a lawsuit. His drug of choice had changed from alcohol to cocaine, and he "used the money to buy a portion of the drug trade in Hidalgo County." Applicant and his brother were induced with free cocaine to join their father's enterprise, and their own business failed. Applicant became heavily dependent, and from about mid-1980 on he began to live for cocaine. He lost 40 pounds, his face turned gray, and his nose would "pour blood" at a mere

touch. His paranoia increased. He believed his wife was trying to poison him, and began to live in his car. At one point he proclaimed that "green things were coming down from trees and . . . they were after him." On the day of the offense applicant's sister "could tell he had a lot of drugs in him."

Psychologist's Report

After interviewing applicant in TDC, conducting a battery of psychological tests, and reviewing the same affidavits as those summarized above, Dr. Brad Fisher, a specialist in forensic clinical psychology, drew the following conclusions:

Leonel Herrera is a 43 year Mexican-American male currently presiding [sic] on Death Row, having resided there since 1982. It is the opinion of this evaluator that this individual suffers from neurological dysfunction, combined with (but not totally separate from) the presence of [Post Traumatic Stress Disorder]. It is probable that these conditions are chronic in the sense that they have existed at least since his experience in Vietnam, and in the case of the neurological handicaps, possibly since a much earlier age. Evidence for these dysfunctions is presented consistently from test data, behavioral observations, and the information available to this examiner for review.

A person who suffers from brain damage does not necessarily have sub-average intellectual functioning. However, such an individual is likely to have inherent limitations in judgment and impulse control.

A person who suffers from PTSD suffers from serious and severe limitations on cognitive functioning, judgment, insight, and perception. All facets of the sufferer's life are affected by this disorder, as he or she frequently cannot reason adequately, perceive reality normally, or respond to situations adequately.

Someone with brain damage, who also suffers from PTSD, is predisposed to substance abuse. A person who suffers from brain damage, PTSD, and substance abuse may deliberately commit a crime, and be violent in the future. However, such a person's culpability is seriously diminished where these conditions occur. This was Mr. Herrera's condition in the fall of 1981.

Thus, we have not only raw data from which a finding of diminished responsibility could be made in this cause – we also have an expert opinion that the raw data does in fact support such a finding in his professional opinion. This would provide a solid base for a jury, in its reasoned moral judgment, to impose a sentence less than death.

Counsel's Affidavit

Applicant's lead counsel at trial has since died. The writ application contains an affidavit from his second chair, Jose Antonio Gomez, who "was not present during voir dire, but entered an appearance after voir dire was completed." His affidavit reads, in relevant part:

> "This was the first capital case in which I had been involved. Naturally I read and researched the Texas death penalty statute. From my understanding of the statute and the

facts of the case, the jurors in Mr. Herrera's case, when deciding the sentence, were to determine only a.) whether the offense was deliberate, and b.) whether there was a possibility that Mr. Herrera would be dangerous in the future. If the jurors answered these questions affirmatively, then the penalty would be death.

"Neither [lead counsel] nor I conducted any investigation into Mr. Herrera's background. We did not have Mr. Herrera evaluated by any mental health expert. We knew that Mr. Herrera was addicted to controlled substances at the time of the offense, we knew there was a possibility that he suffered from brain damage, and we believed that he was under the influence of controlled substances at the time of the offense. We believed, however, that evidence of those conditions would support an affirmative answer to the only two questions that the jury would be allowed to consider and required to answer. While such evidence could provide a compelling basis for a sentence less than death, the statute, as we read it, allowed juror consideration of such evidence only as it related to their answers to two questions, deliberateness and future dangerousness. We would have helped prove the State's case by presenting such evidence, and such evidence could not have been considered independently as providing a basis for a sentence less than death. Because of these restrictions, no such evidence was investigated or presented."

It seems to me this affidavit is susceptible to two interpretations. Counsel could be saying that he and co-counsel were simply unaware of the Eighth Amendment principles that eventually led to the holding in *Penry*, and

failed to investigate mitigating evidence for the simple reason that they believed it to be irrelevant under the statutory scheme. In this event the ineffective counsel claim seems to be established, for there is compelling evidence of mitigation that for no valid reason counsel failed to investigate. E.g., Jones v. Thigpen, 788 F.2d 1101 (CA5 1986); Blake v. Kemp, 758 F.2d 523 (CA11 1985). Alternatively, counsel could be saying they were aware of precedent from this Court holding that an additional instruction regarding uses of mitigating evidence was unwarranted, and believed that to present mitigating evidence and ask the trial court for an instruction would have been futile, and only deleterious to applicant's cause at the trial level. In this event the failure to investigate and present viable mitigating evidence could be viewed as a tactical decision. The Fifth Circuit has ruled that a tactical decision to forego admitting mitigating evidence will not support an Eighth Amendment *Penry* claim, *per se*. See May v. Collins, 904 F.2d 228 (CA5 1990); DeLuna v. Lynaugh, 890 F.2d 720 (CA5 1990). A tactical decision not to investigate or present mitigating evidence may be said to foreclose an ineffectiveness claim under the Sixth Amendment as well. E.g., Middleton v. Dugger, 849 F.2d 491, at 493-4 (CA11 1988).

But I am inclined to believe that a capital accused who can show that *Penry* evidence existed and could have been presented at his trial should be entitled to relief even if his counsel made a conscious decision not to investigate or adduce that evidence at the time of trial. because of this Court's reliance upon the false assurances of Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), that our statute was constitutional as is, even

after Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and its progeny cast a pall upon it, applicant's counsel was put in an intolerable position.

It would be hard to blame counsel if he had decided not to investigate mitigating evidence under the circumstances. There would have been no way for him to assure in advance of trial that the trial court would give the jury an instruction to consider mitigating evidence apart from its relevance to special issues, and make a reasoned moral judgment whether applicant should live or die. Given this Court's pre-*Penry* cases, and the fact that Article 37.071, V.A.C.C.P., does not seem to permit, much less authorize, such an instruction, the chances of his getting it would have been slim to none. Without the instruction, counsel could only hurt applicant's cause by presenting the "mitigating" evidence outlined above. For, although it makes a strong case for a finding of diminished responsibility, applicant's evidence also tends strongly to show he will be a future danger to society. If counsel made a "tactical" decision not to seek and present mitigating evidence, he was forced into that "Hobson's Choice" by Article 37.071, supra, and this Court's adherence to *Jurek* even after the *Lockett* writing was on the wall. See Stewart v. State, 686 S.W.2d 118 (Tex.Cr.App. 1984) (Clinton, J., dissenting). We should not now deny a Sixth Amendment ineffective counsel claim because of a court-induced "tactical" decision to avoid helping the State satisfy its burden of proof. See *May v. Collins*, supra, at 232-34 (Reavley, J., concurring).

In my view we should sustain applicant's Sixth Amendment ineffective assistance of counsel claim. If the Court disagrees that such a claim can be sustained

despite a "tactical" decision not to investigate mitigating evidence here, then we should at least remand for an evidentiary hearing to determine whether counsel's decision was in fact a tactical one, or was simply an oversight resulting from his failure to comprehend the Eighth Amendment principles involved. For if counsel failed to investigate out of pure ignorance, surely he was ineffective. E.g., *Middleton v. Dugger*, supra. Given the nature of the *Penry* evidence here, I believe there is a "reasonable probability" – that is to say, "a probability sufficient to undermine confidence in the outcome" – that the jury might have found in its reasoned moral judgment that applicant deserved a sentence less than death. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, at 2068, 80 L.Ed.2d 674, at 698 (1984). Moreover, if the Court chooses to remand for an evidentiary hearing, proposed findings of fact can be made by the habeas court bearing specifically on applicant's Sixth Amendment ineffective counsel claim – something that was not done before we filed and set the cause for submission.

The Court should either grant relief in this cause on the basis of a denial of applicant's Sixth Amendment right to effective assistance of counsel, or, failing that, remand the cause for an evidentiary hearing on the question of why counsel failed to pursue an investigation into mitigating evidence, and require specific fact finding from the habeas court on the Sixth Amendment issue. The

Court takes neither of these courses, and because it does not, I respectfully dissent.

CLINTON, Judge

(Delivered: May 29, 1991)
EN BANC
PUBLISH

DISSENTING OPINION

This post-conviction application for writ of habeas corpus was filed and set so that the Court could hear argument on the question whether, and if so, under what circumstances, a claim under Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), can be procedurally defaulted for purposes of state review. A majority of the Court has since held that for any cause that was tried before the date of decision in *Penry*, any forfeiture from a failure to object or otherwise raise the issue in the trial court will be excused. Black v. State, ___ S.W.2d ___ (Tex.Cr.App., No. 69,648, delivered this day) (Campbell, J., concurring). This is because before that date a *Penry* claim was a "right not recognized" in this Court. Ex parte Chambers, 688 S.W.2d 483 (Tex.Cr.App. 1984) (Campbell, J., concurring). Applicant Herrera's trial was in January of 1982, seven years before the United States Supreme Court's decision in *Penry*. Nevertheless, the Court holds that applicant's application was improvidently filed and set. We know from *Black* that it cannot have been improvident because of a procedural bar. See also Selvage v.

Collins, ___ S.W.2d ___, (Tex.Cr.App., No. 71,024, delivered this day) (Opinion on Certified Question from the United States Court of Appeals for the Fifth Circuit). I presume, then, that the majority rejects applicant's *Penry* claims on the merits.

Applicant was convicted of the murder of a police officer. See Herrera v. State, 682 S.W.2d 313 (Tex.Cr.App. 1984). He now identifies six categories of mitigating evidence he claims have support in the record of his capital murder trial. Those categories are:

(1) his military service and record;

(2) his history of drug abuse and addiction;

(3) his mental instability;

(4) that he has a caring and loving family that wants him to live;

(5) police brutality after his arrest (the idea being that because he has already suffered some punishment for his crime, a reasonable jury could feel the death penalty to be unwarranted);

(6) his remorse.

L.Ed.2d 973 (1978); Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Penry, *supra*. Cf., Adams v. State, 577 S.W.2d 717 (Tex.Cr.App. 1979); Quinones v. State, 592 S.W.2d 933 (Tex.Cr.App. 1980); Lackey v. State, 638 S.W.2d 439, (Tex.Cr.App. 1982); Stewart v. State, *supra*. *See also* Gribble v. State, ___ S.W.2d ___, (Tex.Cr.App. 1990).

We have decided today that in the trials occurring before *Penry*, there is no procedural default in having failed to request, at the time of trial, a jury instruction on the *Penry* mitigation issue. Black v. State, ___ S.W.2d ___ (Tex.Cr.App. No. 69,648). *See also* Selvage v. Collins, ___ S.W.2d ___ (Tex.Cr.App. No. 71,024) (Opinion on Certified Question from the United States Court of Appeals for the Fifth Circuit). In Lackey v. State, ___ S.W.2d ___ (Tex.Cr.App. No. 69,144) also decided today, although without unanimity and completeness, we attempt to define *Penry* type evidence. In Ex Parte Goodman, ___ S.W.2d ___ (Tex.Cr.App. No. 70,887), we held today that, because it implies a violation of the Eighth and Fourteenth Amendments, the failure to properly instruct the jury on *Penry* type evidence may be cognizable by way of post conviction writ of habeas corpus under Article 11.07, V.A.C.C.P., despite applicant's failure to complain on direct appeal. However, it was mentioned, "absent a contemporaneous offer of proof or bill of exception detailing what mitigating evidence was tactically withheld by the appellant during trial, we will not be heard to consider the same now." *See* Goodman at p. ___, n. 6.

Where this court and the legislature have heretofore failed to give direction, we cannot fault the bar for failing to perfect error or proffer evidence; and this is particularly true since neither we nor the Supreme Court of the United States have yet to fully define the extent, boundaries and limitations of *Penry* type evidence.

I would remand this case for an evidentiary hearing so that the applicant might be allowed to develop his *Penry* type evidence and so that it might be determined if in fact the evidence is that which should have been

submitted to the jury with a proper instruction in accordance with the mandates of Penry v. Lynaugh, *supra*. Because the majority does not do so, I respectfully dissent.

MALONEY, J.

Delivered: May 29, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LEONEL TORRES HERRERA, Petitioner	)	
VS.	)	CIVIL ACTION NUMBER
JAMES A COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	)	M-92-30

MEMORANDUM

Came on to be considered before the Court the Petition for Writ of Habeas Corpus filed by Petitioner, Leonel Torres Herrera (hereinafter "Petitioner") pursuant to Title 28 U.S.C. § 2254, in which relief is sought from a finding of guilty and a sentence of death entered by the 197th Judicial District Court of Cameron County, Texas. Respondent, James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, filed "Respondent's Opposition to Request for Stay of Execution, Motion to Dismiss Pursuant to Rule 9(b) and Alternatively Motion for Summary Judgment and Supporting Brief."

Having considered the pleadings on file, the Court issues the following ruling on the Petition for Writ of Habeas Corpus and the Respondent's responses.

PROCEDURAL HISTORY

The Petitioner attacks a judgment of the 197th District Court of Cameron County, Texas, dated January 21, 1982, wherein he was convicted of capital murder by a jury and sentenced to death. Petitioner's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals. *Herrera v. State*, S.W.2d 313 (Tex. Crim. App. 1984) (*en banc*). Rehearing was denied by the Court of Criminal Appeals without written order on January 16, 1985. The United States Supreme Court denied *certiorari*. *Herrera v. Texas*, 471 U.S. 1131 (1985). Petitioner filed a Petition for Writ of Habeas Corpus in the 197th District Court of Cameron County, Texas, which entered an order recommending denial of the Writ. The Texas Court of Criminal Appeals denied Petitioner's state writ application. *Ex Parte Herrera*, No. 12848-02 (Tex. Crim. App. August 2, 1985).

A Petition for Writ of Habeas Corpus was then filed with this Court on August 7, 1985 and was subsequently denied. Petitioner filed Notice of Appeal and this Court granted a Certificate of Probable Cause. The Fifth Circuit Court of Appeals affirmed this Court's Judgment. *Herrera v. Collins*, 904 F.2d 944 (5th Cir. 1990). A petition for Writ of Certiorari to the United States Supreme Court was denied. *Herrera v. Collins*, ___ U.S. ___, 111 S.Ct. 307 (1990).

The Petitioner subsequently filed a habeas corpus application in the state trial court. The state trial court entered findings of fact and conclusions of law on February 14, 1991 and recommended that the writ be denied. The Petitioner's writ application was transmitted to the

Texas Court of Criminal Appeals which denied all requested relief on the basis of the trial court's findings except one (declining to adopt the trial court's findings of procedural default on Petitioner's claim that the jury could not give effect to the punishment phase evidence) and vacated the stay of execution. *Ex parte Herrera*, 819 S.W. 2d 528 (Tex. Crim. App. 1991) (Clinton and Maloney, J.J., dissenting). The Petitioner sought rehearing which was subsequently denied. The Petitioner has, on December 17, 1991, filed a Petition for Writ of Certiorari to the United States Supreme Court and a Request for Stay of Execution on February 12, 1991, which are still pending. The state trial court has scheduled the Petitioner's execution for Wednesday, February 19, 1992.

Petitioner filed the instant Petition for Writ of Habeas Corpus with this Court on Sunday, February 16, 1992.

The Petition, which is the Petitioner's second federal habeas Petition, raises five claims for relief pursuant to Title 28 U.S.C. § 2254 as follows:

1. The State's failure to reveal exculpatory evidence resulted in the conviction and sentence of an innocent person, in violation of the Sixth, Eighth, and Fourteenth Amendments. Petitioner is innocent, another person has confessed to the crime, and the Petitioner's execution would violate the Eighth and Fourteenth Amendments.

2. Petitioner was tried and sentenced to death for the murder of two police officers by a jury whose members included a police officer detective in an office that investigated the case, in violation of the Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

3. During trial, recesses, and juror deliberations, juror-police officer Bressler was armed, and at least one juror noticed; in addition, and contrary to his sworn statements during voir dire, this officer knew one of the victims. These facts reveal that Petitioner's conviction and death sentence occurred in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

4. Petitioner's sentencer's were precluded from considering evidence which counseled in favor of a sentence less than death, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

5. The trial judge wrongfully refused to allow Petitioner to speak at all during Petitioner's trail and capital sentencing proceeding, thereby violating Petitioner's federal Constitutional rights.

Respondent, as previously stated, has responded to the claims for relief of Petitioner and in addition has filed a Motion to Dismiss pursuant to Rule 9(b) alleging abuse of writ and Motion for Summary Judgment.

FACTUAL BACKGROUND

The evidence at the trial revealed that on the evening of September 29, 1981, a Texas Department of Public Safety Officer, David Rucker (hereinafter "Rucker") was killed by a gunshot wound to the head. There were no witnesses to the shooting, but Petitioner's social security

card was found near the body. Ten minutes later, approximately six miles from where Rucker's body was found, Enrique Carrisalez (hereinafter "Carrisalez") a Los Fresnos, Texas, city police officer, stopped a speeder travelling from the direction of the earlier shooting. As Carrisalez approached the stopped vehicle, the driver shot him in the chest. The officer died nine days later from the wound.

Carrisalez was accompanied by civilian Enrique Hernandez (hereinafter "Hernandez") who witnessed the shooting. Upon attempting to stop the vehicle, Carrisalez called in the license plate number of the car on the police radio. After the shooting, Hernandez radioed in a general description of the suspect's automobile. Immediately afterwards that night, Hernandez was interviewed by police officers.

On the next morning, Hernandez gave a statement to Texas Ranger Bruce Casteel. The police then proceeded to obtain an arrest warrant. On the morning of September 30, just hours after the shooting had occurred, Hernandez was called to the Harlingen police station and shown a display of photographs. From that display, he chose three photographs, one of which portrayed the Petitioner. The following afternoon, October 1, two police officers went to the hospital room of Carrisalez, showed him a single photograph of Petitioner, and asked him three times if he could identify it. Although he could not speak, Carrisalez nodded his head positively identifying Petitioner as the gunman. This same photograph was shown by itself to Hernandez later the same day, who also made a positive identification of Petitioner. The photograph was a mug

shot that carried the notation "Edinburg Police Department" suggesting the person was already in custody.

Hernandez was shown another photographic display on October 6, 1981, two days after Petitioner had been taken into custody. At this showing, he positively identified Petitioner. Finally, on October 24, Hernandez identified Petitioner from a five-man lineup attended by Petitioner's attorney.

Petitioner was arrested on October 4, 1981, and he was taken to the station for questioning. Following the arrest, police searched the Petitioner and found a letter written on the backs of several envelopes, wherein Petitioner discussed the death of both officers. After having been convicted of the capital murder of Carrisalez, Petitioner plead guilty to the murder of Rucker.

Petitioner in the present Petition, claims he is innocent of the murder of both officers and that his brother, Raul Torres, was the one who committed the murders and has offered several affidavits, including one of an alleged eyewitness, in support of his claim of innocence.

RESPONDENT'S MOTION TO DISMISS UNDER RULE 9(b)

Respondent moves to dismiss this case under Rule 9(b) of the Rules Governing Section 2254 cases in the United States District Court, which provides:

> A second of successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds

> that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The abuse of writ doctrine generally "prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding." *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 1470, No. 89-7024 (April 16, 1991). In *McCleskey*, The Supreme Court applied the procedural default standard to abuse of writ inquiries in the following manner:

> When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appeal for the first time and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decision.
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> Federal courts retain the authority to issue the writ of habeas corpus in a further narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.

111 S.Ct. at 1470 citing *Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, 2643 (1986).

Respondent's pleadings sufficiently satisfy the burden imposed in order to plead abuse of writ. The burden shifts and Petitioner must meet the *McCleskey* standards in order to urge the five claims for relief now alleged. Guided by *McCleskey*, this Court must consider all of Petitioner's present claims under the procedural default standard. 111 S.Ct. at 1470.

Because the Court will address the abuse of writ and/or procedural default issues with regards to each one of the five claims for relief, the Court will proceed to discuss each claim below.

CLAIM I

THE STATE'S FAILURE TO REVEAL EXCULPATORY EVIDENCE RESULTED IN THE CONVICTION AND SENTENCE OF AN INNOCENT PERSON, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. PETITIONER IS INNOCENT, ANOTHER PERSON HAS CONFESSED TO THE CRIME, AND THE PETITIONER'S EXECUTION WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

In his first claim, the Petitioner presents allegations that maintain his actual innocence of the capital murder convictions. The petitioner frames part of this claim as a violation of the constitutional principles enunciated in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Petitioner alleges, without proof of any evidence, that law enforcement officials knew of exculpatory evidence and withheld it from defense counsel at trial

and sentencing. In the alternative he alleges he is innocent of the crime and his execution would violate the eighth and fourteenth amendments and an evidentiary hearing on this claim of innocence must be a full and fair one.

The petitioner alleges he was not present when either of the two officers was killed. Petitioner avers he had nothing to do with either murder. To substantiate the claim, the Petitioner offers four affidavits. Affiant Hector J. Villarreal represented the Petitioner's brother Raul Herrera, on a charge of attempted murder. According to Villarreal, Raul Herrera confessed to him that he, not Petitioner, murdered both Rucker and Carrisalez. Villarreal states that Raul Herrera was murdered in 1984. (See Appendix to Petition, No. 10).

Affiant Juan Franco Palacios states that he was a friend of Raul Herrera. Palacios states that on one occasion, when sharing a cell at the Hidalgo County Jail in 1984, Raul Herrera confessed that he murdered Rucker and Carrisalez. (See Appendix to Petition, No. 11). Affiant Jose Ybarra, Jr., an old schoolmate of the Herrera brothers relates a similar confession. (See Appendix to Petition, No. 15). The most recent of the above mentioned affidavits was executed over a year ago and it appears that the Villarreal and Palacios affidavits were presented to the state trial court.

Raul Herrera's son, Raul Herrera, Jr., relates an eyewitness account of the murders in an affidavit executed within the last two weeks. (See Appendix to Petition, No. 16). Raul Herrera, Jr. states he was with his father on the date of the murders and that his father killed both Rucker

and Carrisalez. Affiant Raul Herrera, Jr. states that the Petitioner was not involved and was not present when the murders occurred. This affiant states that he told a police officer this account, but the officer told him never to repeat it. The affiant states no attorney representing the Petitioner asked him about the events until recently.

Although the state trial court considered a claim of newly discovered exculpatory evidence in the Villarreal and Palacios affidavits, the Petitioner complains the trail court summarily dismissed them without a hearing as being meritless. The Petitioner argues he was entitled to an evidentiary hearing by the trial court on this matter and is especially so entitled in light of the latest affidavits. However, as already stated, two of the affidavits including the recent alleged eyewitness one have never been presented to the state trial court.

Although one of the Petitioner's complaints under this claim is as a constitutional *Brady* violation, the Petitioner fails to adequately demonstrate any evidence of withholding exculpatory material by the prosecution. To state a *Brady* claim, the Petitioner must demonstrate that "(1) The prosecution suppressed evidence that was (2) favorable to the accused and (3) 'material to either guilt or punishment.' " *Cordova v. Collins*, ___F.2d___, No. 92-2037, (5th Cir. 1992) citing *Brady*, 373 U.S. at 87. The affidavits offered as 'new evidence' as well as the newspaper articles to which Petitioner refers in this Appendix fail to make any showing that the prosecution even knew about this evidence. The affidavits come from people closely associated with the Petitioner or his brother. The Petitioner has failed to show the first prong of a *Brady* claim and thus no constitutional violation under *Brady*.

Since this allegation contains evidence which was acquired after the first federal habeas petition in 1985 this Court will not use the abuse of writ standard but will grant the Respondent's Summary Judgment Motion on this issue.

With regard to the second portion of Petitioner's claim in which he claims actual innocence and constitutional violations of his eighth and fourteenth amendment rights thereto, the general rule is that if a petitioner present a substantial allegation of newly discovered evidence, a federal habeas court must grant an evidentiary hearing. *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 757 (1963). A petitioner is entitled to an evidentiary hearing when the state court did not provide a full, fair, and adequate hearing. *Id.* However, newly discovered evidence bearing directly upon guilt or innocence is not properly presented in a petition for habeas corpus, unless the petition implicates a constitutional violation. *Shaver v. Ellis*, 255 F.2d 509 (5th Cir. 1958) and *Smith v. Wainwright*, 741 F.2d 1248 (11 Cir. 1984) *reh'g denied, en banc* 747 F.2d 1468, *cert. denied* 470 U.S. 1088 (1985). As already stated, it is important to note that two of Petitioner's affidavits alleging his innocence including the very recent one of the alleged eyewitness have not been presented to the trial court.

This Court realizes that the Petitioner's execution is imminent and feels that, in order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process, he should be afforded an opportunity to present his constitutional claim of alleged actual innocence along with his evidence including his recently acquired evidence on said issue to the state trial

court and that the state court should be afforded the opportunity to consider said issues.

The Court realizes the state court is normally bound by a "rule of habeas abstention" preventing the state court from considering the merits of a habeas petition when a federal habeas proceeding is pending on the same matters. See *May v. Collins*, 948 F.2d 162, 169, (5th Cir. 1991) *cert. denied* 60 U.S.L.W. 3479 (U.S. 1992). As stated, the Court is also cognizant of the time constraint faced by Petitioner. The Court believes the prudent course here is for this Court to grant the Petitioner's stay of execution request and for this Court to retain jurisdiction of the portion of Petitioner's first claim in which he alleges he is actually innocent and that his execution would violate his eighth and fourteenth amendment rights until noon, February 21, 1992 at which time the Court shall DISMISS said claim without prejudice provided Petitioner shall have filed by then an appropriate application with the state trial court with his constitutional claim of alleged actual innocence along with his recently acquired evidence on said issue. Said DISMISSAL shall be sooner and shall take effect at the time of filing of said state application if same be filed sooner.

In the event that this issue would not be found of sufficient grounds for granting a stay of execution, this Court, as an alternative and independent grounds for granting the stay, would note that Petitioner argues that he has not been provided a full and fair hearing as he alleges is constitutionally required since no evidentiary hearing was provided by the state trial court judge after he submitted some affidavits and this Court would therefore grant a stay pending the Fifth Circuit Court of

Appeals opinion in *May v. Collins*, No. 91-6273 which raises similar issues as when an evidentiary hearing is required where, as here, the evidence is also a claim of actual innocence and affidavits are involved.

CLAIM II

PETITIONER WAS TRIED AND SENTENCED TO DEATH FOR THE MURDER OF TWO POLICE OFFICERS BY A JURY WHOSE MEMBERS INCLUDED A POLICE OFFICER DETECTIVE IN AN OFFICE THAT INVESTIGATED THE CASE, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM III

DURING TRIAL, RECESSES, AND JUROR DELIBERATIONS, JUROR-POLICE OFFICER BRESSLER WAS ARMED, AND AT LEAST ONE JUROR NOTICED; IN ADDITION, AND CONTRARY TO HIS SWORN STATEMENTS DURING VOIR DIRE, THIS OFFICER *KNEW* ONE OF THE VICTIMS. THESE FACTS REVEAL THAT PETITIONER'S CONVICTION AND DEATH SENTENCE OCCURRED IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In Claims II and III, which will be discussed together, Petitioner claims his sixth, eighth and fourteenth amendment rights were violated as a result of the service of Brownsville Police Detective Joseph J. Bressler (hereinafter, Bressler) as a juror in his case. Some conclusory statements are made about the service of three other jurors (two of whom were relatives of police officers and another an acquaintance of Rucker) but the two claims are worded on the service of Bressler.

The gist of the Petitioner's complaint as to Bressler's service appears to be centered on mere speculation on the Petitioner's part unsubstantiated by any evidence or law. The Petitioner complains that the service of Bressler created an appearance of unfairness and caused someone to serve who was automatically biased and would believe law enforcement officials and in addition created a constitutionally impermissible risk that a sentence of death would be imposed. In addition, Petitioner presents an affidavit with hearsay evidence that a juror (who has refused to sign an affidavit to that effect) had indicated to an investigator for Petitioner that Bressler was armed during the proceedings and had known Rucker although during voir dire he claimed he did not. (See, Appendix to Petition No. 13). An additional hearsay affidavit has been filed alleging that another juror had stated that Bressler, at the start of jury deliberations, expressed his view that the Petitioner was guilty and had stated facts about Petitioner that were not in evidence and that his views had an influence on her decision. Said juror has also refused to sign such an affidavit and, in fact, when requested to do so, stated that she would not sign such an affidavit as it was not true. (See, Appendix to Petition No. 14).

The Peititioner argues that, although the trial court alleged these claims were procedurally defaulted, the Petitioner properly presented them to the court which ruled on their merits. The Petitioner further asserts these claims implicate a fundamental miscarriage of justice and should not be dismissed before consideration on the merits. This Court finds that Petitioner has not established cause and prejudice under either procedural default or abuse of writ. The Court further finds that

these claims do not implicate a fundamental miscarriage of justice as they do not embrace constitutional violations resulting in the conviction of one actually innocent of the crime or sentence.

The Petitioner's trail counsel moved for a mistrial based, in part, upon Petitioner's dissatisfaction with the selection of Bressler and the other three as jurors. Trial Record, vol. 12, p. 3. However, the trial court in the most recent state habeas petition, specifically found that the Petitioner was procedurally barred from making these claims, as trial counsel made no direct challenge for cause to Bressler but rather simply asked for an additional preemptory challenge. *Ex Parte Herrera*, No. 71, 171, Amended Order of February 14, 1991. The Court of Criminal Appeals found the trial court's conclusions were supported by the record. *Ex parte Herrera*, 819 S.W.2d 528 (Tex. Crim. App. 1991).

The Court similarly finds that the Petitioner has not established cause for failure to raise these claims in his earlier federal petition. Unquestionably, all of the facts surrounding Bressler's selection and service upon which Petitioner now bases his second and third claims, became known during jury selection and as to any which were not Petitioner has not shown cause as to why they were not discovered before the Petitioner filed his first federal habeas Petition in 1985. The same applies as to any complaints about the other three jurors. In short, nothing prevented Petitioner from raising Claims II and III earlier. Petitioner fails to offer any evidence to aid in establishing cause.

The Petitioner seeks to skirt these impediments by asserting Claims II and III are not barred as they involve a fundamental miscarriage of justice. The Court questions whether the Petitioner has even identified a constitutional violation which would lead to the conviction of an innocent person here as required by *McCleskey*. While Petitioner states his sixth, eighth and fourteenth Amendment rights were violated, the Court as previously noted has not been cited anything in law or evidence other than speculation and conclusion that would lead to the conclusion of any constitutional violation.

In addition, Petitioner has not indicated that he has any evidence, hearsay or otherwise, that even if Bressler did carry a gun during his service as a juror, it affected any other juror, nor has he presented other than hearsay any evidence to the effect that Bressler did know Rucker contrary to his own sworn statement during voir dire and that even if he did it affected any juror's decision.

Petitioner, having failed to satisfy the *McCleskey* standard as to Claims II and III, must have said claims dismissed as an abuse of writ.

CLAIM IV

PETITIONER'S SENTENCER'S WERE PRECLUDED FROM CONSIDERING EVIDENCE WHICH COUNSELED IN FAVOR OF A SENTENCE LESS THAN DEATH, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In this fourth claim for relief, Petitioner asserts, under *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989)

that: (1) the jury was precluded from considering mitigating circumstances which were in evidence; and, (2) other, available evidence was not presented because of counsel's understanding of the Texas capital sentencing scheme. He argues that had the jury been able to consider this evidence beyond the scope of the two special issues on deliberateness and future dangerousness, it could have imposed a life sentence. Therefore, Petitioner argues, the Texas statute was applied in violation of his sixth, eighth and fourteenth amendment rights. The Respondent argues that raising this issue in this second federal habeas petition as opposed to raising it in the first federal habeas petition in 1985 constitutes abuse of the writ and under Rule 9(b) the claim should be dismissed.

Petition asserts evidence of his military service, his remorse, his mental instability, his substance abuse, his caring family, and police brutality after his arrest is supported by the record. While conceding that this evidence could have been considered under the special issues of the Texas capital sentencing scheme, the Petitioner claims the special issues allowed only an aggravating effect upon future dangerousness.

Petitioner also contends evidence such as psychological evaluations were not pursued because of trial counsel's understanding of the effect to be given mitigating circumstances under the special issues. Petitioner alleges counsel believed any such evidence would only contribute to affirmative answers on the special issues. As a result, counsel did not bring evidence of an abusive father, head injuries, and untreated illnesses to the jury.

The Petitioner has recently secured a psychological evaluation which asserts the Petitioner suffered from neurological impairment and Post Traumatic Stress Disorder (See, Appendix to the Petition No. 9).

As stated previously, *McCleskey* held that Rule 9(b) provides that a second or successive petition for federal habeas relief which raises claims that could have been raised in an earlier federal habeas petition should be dismissed unless the Petitioner can demonstrate both cause for his failure to present the claim in the earlier petition and resulting prejudice. The *McCleskey* Court went on to say that a petition may make a valid cause showing where a particular legal theory was not yet a viable option for the Petitioner.

Petitioner argues that his pre-*Penry* belief that courts had correctly interpreted the Texas capital punishment statute and that presentation of evidence as to the Petitioner's mental incapacities and other alleged mitigating circumstances would only support a "Yes" in response to the special issues presented to the jury for consideration, is cause for the Petitioner's failure to raise this claim earlier.

There is no merit to the Petitioner's argument that his understanding of the law prior to *Penry* explains his failure to make this claim previously in his 1985 federal habeas petition.

The Fifth Circuit in *Cuevas v. Collins*, 932 F.2d 1078, (5th Cir., 1991) found that *Penry* claims have been made since 1980 when the Texas Court of Criminal Appeals found that there was no need for an explanatory jury charge with regard to the consideration of mitigating

evidence during the sentencing phase of a capital murder trial. *Quinones v. State*, 592 S.W.2d 933, 947 (5th Cir. 1980). The Fifth Circuit held,

> [i]n *Selvage v. Lynaugh*, 842 F.2d 89, 94 (5th Cir. 1988), we found that as early as April 1980, a *"Penry"* contention, as it later became known, was "not a recently found legal theory not knowledgeable by competent counsel". . . . There is no basis for asserting that it would have been futile for Cuevas to have pursued his *Penry* claim in his first federal habeas petition. He did so in the federal district court but abandoned the argument on appeal. Nor is the fact that the law is "developing" of aid to Cuevas. The "question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986).

Cuevas at 1082.

Thus, Petitioner's argument that the law in 1985, when Petitioner could have included this claim with his first federal habeas petition, did not provide for a viable *Penry* claim, must fail as Petitioner has failed to show any cause for failure to have raised these issues then.

The Petitioner alternatively argues that to bar his *Penry* claim may give rise to a viable fundamental miscarriage of justice claim. The Court is cognizant that the type of cases where a fundamental miscarriage of justice would apply is in "extraordinary instances where a constitutional violation has caused the conviction of one innocent of a crime." *McCleskey*, at 1470.

The Supreme Court has extended the term "innocent of a crime" to include cases where one would be "innocent" of a death sentence. As the Supreme Court stated in *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 1217 n. 6 (1989):

> In *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2650, 91 L.Ed.2d 397 (1986), this Court stated that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." We made clear, however, that such a case would be an "extraordinary" one, *ibid.*, and have since recognized the difficulty of translating the concept of "actual" innocence from the guilt phase to the sentencing phase of a capital trial. *Smith v. Murray*, 477 U.S. 527, 537, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986). We do not undertake here to define what it means to be "actually innocent" of a death sentence. . . . Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received.

This Court has faced this issue before in *Bird v. Collins*, in a case where the petitioner was alleging evidence of psychological, sociological and mental condition which he claimed made him innocent of the death sentence and granted a stay pending oral argument on this issue. The Fifth Circuit in *Bird v. Collins*, 943 F.2d 629 (5th Cir. 1991) at p. 630 vacated this Court's decision to stay

the execution pending oral argument and stated as follows:

> The district court hesitated over the expressed uncertainty of the Supreme Court in translating the concept of actual innocence to innocence of a death sentence. The district court quoted from *Smith v. Murray*, 477 U.S. 527, 539, 106 S.Ct. 2661, 2884, 91 L.Ed.2d 434 (1986) that:
>
> > We do not undertake here to define what it means to be "actually innocent" of a death sentence. . . . Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case." [*Murray v. Carrier*, supra. 477 U.S. [478] at 496, 106 S.Ct. [2639], at 2650, [91 L.Ed.2d 397 (1986)], into an all too ordinary one.

We recently acknowledged this uncertainty in *Cuevas v. Collins*, 932 F.2d 1078 (5th Cir. 1991). However we also concluded that whatever may be the "extraordinary" level of *Penry* type evidence not given expression under the question of deliberateness and future dangerousness sufficient to render a petitioner "actually innocent" of a sentence as opposed to error that "might have affected [its] accuracy", it was not presented by *Cuevas*. We reach the same conclusion here.

This Court, therefore, notes that here as in *Bird* whatever the extraordinary level of *Penry* type evidence not given expression under the questions of deliberateness and future dangerousness sufficient to render a Petitioner actually innocent of a sentence as opposed to error that might have affected its accuracy is not present and therefore this claim must be dismissed as an abuse of writ.

CLAIM V

THE TRIAL JUDGE WRONGFULLY REFUSED TO ALLOW PETITIONER TO SPEAK AT ALL DURING PETITIONER'S TRIAL AND CAPITAL SENTENCING PROCEEDING, THEREBY VIOLATING PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS.

The Petitioner contends he was restrained by the trial court from exercising *any* constitutional rights. The Court, responding to an outburst by Petitioner, instructed him not to disrupt the proceedings or the court would have him placed in an observation room. Petitioner now protests, without any evidentiary support, that this action rendered him effectively mute and unable to participate in his defense.

The Petitioner derives this claim from events readily discernible in the record. As already stated, at one point during voir dire, the Petitioner spoke out, complaining of the proceedings. The trial court ordered that he be placed in the observation room where he could see and hear the proceedings without being disruptive. This transpired before a noon recess. Trial Record, vol. 10, p. 61-63. After

reconvening, with the Petitioner apparently back at counsel's table, the court again cautioned him not to be disruptive or he would return to the observation room. The court noted that it was in the Petitioner's interests to be able to consult with counsel. The Petitioner acknowledged comprehension of the court's warning. Trial Record, vol. 10, p. 66-67. The Petitioner points to no other occasion in which he was removed to the observation room nor where he was prohibited from consulting with counsel.

As stated previously, the Court in *McCleskey* held that Rule 9(b) provides that a second or successive petition for federal habeas relief which raises claims that could have been raised in an earlier federal habeas petition should be dismissed unless the petitioner can demonstrate both cause for his failure to present the claim in the earlier petition and resulting prejudice.[1] The Petitioner directs this Court to nothing that would demonstrate cause for failure to have previously raised this issue. As previously noted, the facts serving as the basis for this claim were clearly ascertainable from the Trial Record. Therefore, Petitioner's only door to relief on this claim hinges on whether this claim implicates a fundamental miscarriage of justice. See *McCleskey* at 1470.

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[1] The Court recognizes that this claim is also procedurally barred. The Texas Court of Criminal Appeals found that the trial court's findings of fact and conclusions of law as to this claim, in which the trial court found error was not preserved, were supported by the record. *Ex Parte Herrera*, 819 S.W.2d 528 (Tex. Crim. App. 1991). The cause and prejudice standard still applies. Petitioner fails to demonstrate cause for failure to preserve error.

The Court finds nothing in this claim implicating a fundamental miscarriage of justice. The Petitioner identifies no constitutional violation in this claim which "probably has caused the conviction of one innocent of the crime." *McCleskey, id.* The Court appreciates an accused's basic right to be present in the courtroom during all stages of a trial under the Sixth Amendment. However, this right does not allow a defendant to disregard proper courtroom decorum nor to disrupt the conduct of trial proceedings. As the Supreme Court stated in *Illinois v. Allen*, 397 U.S. 337, 343; 90 S.Ct. 1057, 1060-1061 (1970) *reh'g denied*, 398 U.S. 915, 90 S.Ct. 1684 (1970).

> Although mindful that courts must indulge every reasonable presumption against loss of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

In Petitioner's trial, he was briefly placed in an observation room and allowed to return, enabling him to

participate in his defense. The Petitioner points to nothing which demonstrated a constitutional violation. Therefore, this claim constitutes an abuse of writ and should be dismissed.

REQUEST FOR EX PARTE HEARING FOR EXPERTS AND INVESTIGATORS

Nothing in the Petition indicates the necessity of this Court holding an *ex parte* hearing of the appointment of experts and investigators for Petitioner.

CONCLUSION

For the foregoing reasons the Court is of the opinion that the Respondent's Motion to Dismiss pursuant to Rule 9(b) should be GRANTED as to Petitioner's claims for relief Numbers II, III, IV and V. The Court is further of the opinion that the Respondent's Motion for Summary Judgment as to the portions of Claim Number I, which relies on constitutional *Brady* violations should be GRANTED and that the Court should retain jurisdiction of the remaining portion of Petitioner's Claim Number I in which he alleges he is actually innocent and his execution would violate his eighth and fourteenth amendment rights until noon, February 21, 1992 at which time this Court will DISMISS said claim without prejudice provided Petitioner shall have filed by then the appropriate application with the state trial court with his constitutional claim of alleged actual innocence along with his evidence including his recently acquired evidence on said issue. If same be filed sooner said DISMISSAL shall take effect at the time of filing of said application. In the event

that this issue would not be found of sufficient grounds for granting a stay of execution, this Court, as an alternative and independent grounds for granting the stay, would note that Petitioner argues that he has not been provided a full and fair hearing as he alleges is constitutionally required since no evidentiary hearing was provided by the state trial court judge after he submitted some affidavits and this Court would therefore grant a stay pending the Fifth Circuit Court of Appeals opinion in *May v. Collins*, No. 91-6273 which raises similar issues as to when an evidentiary hearing is required where, as here, the evidence is also a claim of actual innocence and affidavits are involved. The Court is also of the opinion that in order to accomplish this the Motion for Stay of Execution should be GRANTED as per the order of even date herewith.

The Clerk shall send a copy of this Memorandum to counsel for Petitioner and counsel for Respondent.

Done this 17th day of February, 1992 at McAllen, Texas.

/s/ Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

(Caption Omitted In Printing)

ORDER

Came on for consideration the Petitioner's "Motion to Alter and Amend Judgment and for Reconsideration of Orders Entered February 17, 1992" in which the Petitioner requests reconsideration of the Court's previous granting of the Respondent's Motion for Summary Judgment on the part of his first claim for relief which alleged constitional *Brady* violations and the Court being of the opinion that same should be GRANTED and that the Court's previous statements and analysis on said issues in the portion of its previous Memorandum discussing said issues should be withdrawn as the Court is persuaded that there are sufficient factual and legal allegations under the applicable legal standards to necessitate an evidentiary hearing on this matter before this Court.

It is, therefore, ORDERED, ADJUDGED and DECREED that the portion of the Court's previous Order granting Summary Judgment on the Petitioner's first claim alleging *Brady* violations is hereby withdrawn and this cause is set for an evidentiary hearing on the Petitioner's allegations in Claim for Relief Number I on Friday, February 21, 1992, before this Court at 10:00 a.m. in the 9th Floor Courtroom, 1701 West Business Highway 83, McAllen, Texas.

The Clerk shall send a copy of this Order to counsel for Petitioner and to counsel for Respondent.

DONE on this 18th day of February, 1992, at McAllen, Texas.

/s/ Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

(Caption Omitted In Printing)

ORDER SUPPLEMENTING PREVIOUS ORDER STAYING EXECUTION

Petitioner Leonel Torres Herrera was found guilty of capital murder and given a sentence of death by the 197th Judicial District Court of Cameron County, Texas. A Motion for Stay of Execution and a Petition for Writ of Habeas Corpus, pursuant to Title 28 U.S.C. § 2254, was filed with this Court on Sunday, February 16, 1992. Petitioner is scheduled to be executed on Wednesday, February 19, 1992.

The Court by Order of even date herewith having GRANTED the Respondent's Motion to Reconsider its granting of Motion to Summary Judgment on the issue addressed in his First Claim for relief alleging constitutional *Brady* violations by Order of even date herewith and having set an evidentiary hearing on said issues for Friday, February 21, 1992 at 10:00 a.m. before this Court hereby GRANTS A Stay of Execution pending the resolution of said issues by this Court.

The Court has considered the applicable legal standard enunciated in *Selvage v. Lynaugh*, 842 F.2d 89 (5th Cir. 1988) with regards to this claim in granting a stay as follows:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *O'Bryan v. McKaskle*, 729 F.2d 991, 993 (5th Cir. 1984); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982), cert. denied, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984); *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982).

> *In a capital case "while the movant need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e. the other three factors] weighs heavily in the favor of granting the stay."* *O'Bryan v. McKaskle*, 729 F.2d at 993 (quoting *Ruiz v. Estelle*, 666 F.2d at 856).
>
> *Colestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 6, 97 L.Ed.2d 796 (1987); see also *Streetman v. Lynbaugh*, 835 F.2d 1521, 1524 (5th Cir. 1988) (emphasis added).

The Court finds that a stay in this case is appropriate. It is THEREFORE,

ORDERED, ADJUDGED and DECREED that Petitioner's Motion for Stay of Execution be hereby GRANTED and that Petitioner's execution shall be STAYED pending resolution by this Court of Petitioner's First Claim.

The Court notes that a previous Order granting a Stay of Execution was granted by this Court on February 17, 1992 and the reasons stated in the granting of this Stay of Execution are in addition to and independent to the reasons stated in said Order and shall supplement said Order.

It is further ordered that the Clerk shall give immediate telephonic and telegraphic notice to James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, to the Honorable Ann Richards, Governor of the State of Texas; and to the Honorable Dan Morales, Attorney General of the State of Texas that Leonel Torres Herrera's execution is stayed by order of this Court. A certified copy of this Order shall be subsequently served upon these persons by the United States Marshal.

The Clerk shall send a copy of this Order to counsel for Petitioner and counsel for Respondent.

Done this 18th day of February, 1992, at McAllen, Texas.

/s/ Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2114

LEONEL TORRES HERRERA,

Petitioner-Appellee,

VERSUS

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before KING, DAVIS and JONES, Circuit Judges.

DAVIS, Circuit Judge:

James A. Collins, Director, Texas Department of Criminal Justice, appeals the district court's order staying the execution of Leonel Torres Herrera. Herrera's execution is scheduled for February 19, 1992, between midnight and dawn.

I.

The district court's thorough memorandum opinion and order of February 17 outlines in detail the critical steps which have been taken in this case. In summary, Herrera was sentenced to death on January 21, 1982,

following his conviction for capital murder. The Texas Court of Criminal Appeals affirmed Petitioner's conviction and death sentence, **Herrera v. State,** 682 S.W.2d 313 (Tex. Crim. App. 1984) (en banc). The United States Supreme Court denied certiorari, **Herrera v. Texas,** 471 U.S. 1131 (1985). Petitioner filed a petition for writ of habeas corpus in the 197th District Court of Cameron County, Texas. The convicting court recommended that relief be denied and in August 1985, the Texas Court of Criminal Appeals denied relief. **Ex parte Herrera,** Application # 12,848-02-Texas Criminal Appeals 1985. Thereafter, on August 7, 1985, Herrera filed his first federal petition for habeas corpus, and the district court stayed Herrera's scheduled execution. In October 1989, the federal district court rejected Herrera's habeas petition and dissolved the stay of execution. Herrera appealed that judgment to this court. On June 25, 1990, we affirmed the district court judgment and vacated Herrera's stay of execution, **Herrera v. Collins,** 904 F.2d 944 (5th Cir. 1990). The Supreme Court denied certiorari, **Herrera v. Collins,** ___ U.S. ___, 111 S.Ct. 307 (1990).

Herrera filed his second application for state writ of habeas corpus on December 12, 1990. On January 14, 1991, the trial court withdrew an earlier order, entered findings of fact and conclusions of law, and denied habeas relief. The Court of Criminal Appeals denied relief on May 29, 1991, on the basis of the trial court's finding and conclusions and vacated a stay of execution.

On December 17, 1991, Herrera filed a petition for writ of certiorari in the United States Supreme Court, which is still pending. Herrera filed the instant application for federal writ of habeas corpus in the district court

on February 16, 1992, raising five claims for relief.[1] The claims that Herrera asserts in his present petition are not duplicative of the claims he asserted in his first petition.

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[1] Herrera raises the following claims in the instant habeas petition:

> 1. The State's failure to reveal exculpatory evidence resulted in the conviction and sentence of an innocent person, in violation of the Sixth, Eighth, and Fourteenth Amendments. Petitioner is innocent, another person has confessed to the crime, and the Petitioner's execution would violate the Eighth and Fourteenth Amendments.
>
> 2. Petitioner was tried and sentenced to death for the murder of two police officers by a jury whose members included a police officer detective in an office that investigated the case, in violation of the Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.
>
> 3. During trial, recesses, and juror deliberations, juror-police officer Bressler was armed, and at least one juror noticed; in addition, and contrary to his sworn statements during voir dire, this officer knew one of the victims. These facts reveal that Petitioner's conviction and death sentence occurred in violation of his Sixth, Eighth, and Fourteenth Amendment rights.
>
> 4. Petitioner's sentencers were precluded from considering evidence which counseled in favor of a sentence less than death, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.
>
> 5. The trial judge wrongfully refused to allow Petitioner to speak at all during Petitioner's trial and capital sentencing proceeding, thereby violating Petitioner's federal Constitutional rights.

The district court denied all relief on claims 2,3,4 and 5 on grounds of writ abuse. The court initially denied petitioner's **Brady** claim, (which was included as part of his first claim) on grounds that insufficient facts were presented to support this claim. On reconsideration, the district court, however, concluded that sufficient facts were presented to require a hearing which he scheduled for February 21, 1992. The district court granted a stay of execution pending that hearing. The district court also granted petitioner's motion for a stay of execution to permit petitioner to further litigate in state court the second prong of his first claim – actual innocence. Alternatively, the court granted a stay pending rendition of an opinion by this court in **May v. Collins,** No. 91-6273. The district court also signed a Rule 54(b) judgment dismissing claims 2-5 and issued a certificate of probable cause as to these claims. Collins filed an appeal from the district court's order granting a stay of execution and moved this court for an order vacating the stay of execution.

II.

For reasons stated by the district court, it correctly rejected petitioner's claims 2, 3, 4 and 5 because the petitioner has clearly abused the writ as to those claims. **See McCleskey v. Zant,** ___ U.S. ___, 111 S.Ct. 1454 (1991).

On the **Brady** prong of petitioner's first claim, we agree with the district court's initial conclusion that petitioner neither proffered evidence nor alleged particularized facts that demonstrate that the state withheld any favorable evidence from Herrera before his trial. As

stated above, the district court, on reconsideration, concluded that the pleadings and affidavits were sufficient to require a hearing on one issue: whether the state knew that petitioner was innocent of the murder of Officer Carrisalez and withheld that information from Herrera before his trial. We are not persuaded that Herrara's petition as amplified by his exhibits state specific facts that "point to real possibility of constitutional error." **Blackledge v. Allison,** 431 U.S. 63, 75 n. 7, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Herrera never identifies any specific evidence that he contends was withheld by the prosecutor before trial. Instead, he relies on affidavits and newspaper clippings to suggest that the prosecutor knew that Raul Herrera, rather than Leonel Herrera, committed the murders. Nothing in any of the exhibits suggests, however, that the prosecutor could have known of the information contained within them at the time of Herrera's trial.

The newspaper clippings upon which Herrera relies make no reference at all to the instant case and do not refer to police corruption in connection with drug acitivity in South Texas prior to 1985 – three years after Herrera's trial; further, they contain nothing to suggest that anyone who testified at his trial or any officials in Cameron County, where Herrera was convicted, have ever been involved in any wrongdoing. The affidavit of Raul Herrera, Jr., states that he told a police officer that this father committed the murders rather than Petitioner, but he does not say when or to whom this information was conveyed. Consequently, Herrera has not pled with sufficient particularity the elements of his **Brady** claim to require a hearing. **Id.**

Moreover, the exculpatory evidence on which Herrera relies is a claim that someone else, and not he, committed the offenses of which he was convicted. The person at whom he points the finger is his brother, Raul, now deceased. Particularly in light of the fact that his brother allegedly committed the offense in the car which Petitioner normally drove, this information clearly was not only available to the defense, but was likely more available to the defense than it was to the prosecution. "**Brady** does not oblige the government to provide the defendants with evidence that they could obtain from other sources by exercising reasonable diligence." **United States v. McKenzie,** 768 F.2d 602, 608 (5th Cir. 1985) (citation omitted), **cert. denied,** 474 U.S. 1086, 106 S.Ct. 861 (1986). "When evidence is available equally to the defense and the prosecution, the defendants must bear the responsibility for their failure to diligently seek its discovery." **Id., citing United States v. Milstead,** 671 F.2d 950, 953 (5th Cir. 1982). Herrera's attempt to couch this claim in terms of a **Brady** violation therefore is disingenuous.

We therefore turn to the second turn to the second issue which the district court concluded required it to grant a stay of execution. As a part of his first claim, Herrera contended that he was actually innocent of Carrisalez's murder. Herrera filed a substantially identical claim in the state habeas court. In support of his state habeas claim Herrera attached two affidavits. First, he attached the affidavit of attorney Hector J. Villareal, who had represented petitioner's brother, Raul Herrera, on a charge of attempted murder. Villareal asserted that Raul

Herrera confessed to him that Raul, not petitioner, murdered both Rucker and Carrisalez. Herrera also submitted the affidavit of Franco Palacios, one of his brother Raul's cell mates. Palacios stated that Raul confessed to him that Raul had murdered Rucker and Carrisalez.

When Herrera filed his federal habeas petition, he attached two additional affidavits. The most significant affidavit he attached is the affidavit of his nephew, Raul Herrera, Jr., the son of Raul Herrera. Raul Herrera, Jr. stated that he was with his father on the date of the murders and that he saw his father kill both Rucker and Carrisalez. According to Raul Herrera, Jr., the petitioner was not present when the murders occurred. Raul, Jr. also stated that he told a police officer what occurred but the officer told him never to repeat it. Raul, Jr. did not suggest when this conversation occurred. Raul, Jr. states that no attorney representing the petitioner had ever asked him about the events until recently. His affidavit is dated about two weeks ago, January 29, 1992. Petitioner also included the affidavit of an old schoolmate of the Herrera brothers, who related that Raul, Sr. made a confession to him similar to the one attorney Villareal asserted that Raul had made.

In his federal habeas petition, Herrera asserted that he was entitled to a hearing on his actual innocence claim, particularly in light of Raul Herrera, Jr.'s affidavit. The district court concluded that petitioner should have an opportunity to present the affidavit of the alleged eye witness, Raul Herrera, Jr. The district court then granted the petitioner's stay of execution and retained jurisdiction of the petitioner's "actual innocence" claim until noon, February 21, 1992. The district court directed that it

would dismiss that claim without prejudice on February 21, 1992, provided petitioner had filed a successive state habeas petition so that he could present the additional evidence to that court.

We begin our analysis of the propriety of the district court's stay with the recent admonition of the Supreme Court: "A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief may be granted.' " **Delo v. Stokes,** 495 U.S. 320, 109 L.Ed.2d 325, 328, 110 S.Ct. 1880, 1881 (1990), (quoting **Barefoot v. Estelle,** 463 U. S. 880, 895, 103 S.Ct. 3383, 3396 (1983)). This court has held that a court should consider four factors in deciding whether to grant a stay of execution:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing or irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

Byrne v. Roemer, 847 F.2d 1130, 1133 (5th Cir. 1988) (quoting **Streetman v. Lynaugh,** 835 F.2d 1521, 1524 (5th Cir. 1988)). Although in a non-abuse context the movant in a capital case "need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e., the other three factors] weighs heavily in the favor of granting the stay.' " **Celestine v. Butler,** 823 F.2d 74, 77 (5th Cir.) (quoting **O'Bryan v. McKaskle,** 729 F.2d 991, 993 (5th Cir. 1982), **cert. denied,** 483 U.S. 1036, 108 S.Ct. 6 (1987). However, the Supreme Court's recent decision in **Delo v. Stokes,** 495 U.S. at 320, 110 S.Ct. at 1880, makes it clear that, in a case involving a second or subsequent petition, the latter three factors cannot weigh in favor of a stay in the absence of substantial legal claims upon which relief may be granted.

Herrera's claim of "actual innocence" presents no such substantial claim for relief. The rule is well established that claims of newly discovered evidence, casting doubt on the petitioner's guilt, are not cognizable in federal habeas corpus, **see Townsend v. Sain,** 372 U.S. 293, 317, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Texas has adopted a similar rule. **See Ex parte Binder,** 660 S.W.2d 103, 104-106 (Tex. Crim. App. 1983). Moreover, the right to collaterally attack a conviction is not a right guaranteed by the Constitution. **Pennsylvania v. Finley,** 481 U.S. 551, 107 S.Ct. 1990, 1994 (1987).

In **Townsend v. Sain,** 372 U.S. 293 (1963), the Court held that a federal habeas court must grant an evidentiary hearing on an allegation of newly discovered evidence only when the evidence "bear[s] upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." 372 U.S. 293 (1963). We have recognized the above statement as the Court's holding in at least two cases, **Armstead v. Maggio,** 720 F.2d 894, 896 (5th Cir. 1983) (per curiam), and **Boyd v. Puckett,** 905 F.2d 895, 896 (5th Cir. 1990), **cert. denied,** 112 L.Ed.2d 337, 111 S.Ct. 526 (1990).

Thus, once **Herrara's Brady** claim is rejected, Herrera's "actual innocence" claim does not allege a ground upon which habeas relief can be granted. Under Texas law, a claim of innocence based on newly discovered evidence is grounds for a new trial but such a claim will not support collateral review. **See, e.g. Ex parte Binder,** 660 S.W.2d 103, 105-06 (Tex. Crim. App. 1983) (en banc). Herrera, therefore, has presented no claim for collateral relief under Texas law. Consequently, we can find no legal justification to permit him to present, in piecemeal fashion, additional affidavits to the state court. We conclude that the district court erred in granting a stay of execution for this purpose.

May v. Collins relied upon as an alternate ground for a stay, is inapposite. The question in **May** concerns whether a finding of fact by a state habeas court, based upon affidavits alone, is entitled to the presumption of correctness. But the facts at issue in **May** implicated a constitutional defect in **May's** conviction. No such question is presented in this case.

III.

CERTIFICATE OF PROBABLE CAUSE

The district court issue a certificate of probable cause (CPC) with respect to claims 2-5, although it rejected any relief on these claims. This certificate implies that the district court found that petitioner had made a substantial showing of the denial of a federal right with respect to these claims. **Barefoot v. Estelle,** 463 U.S. 880 (1983). Ordinarily a stay of execution accompanies such a finding

and we are uncertain whether the district court inadvertently failed to grant a stay on these claims. Because of the ambiguity of the grant of CPC on claims 2-5 and the failure to grant a stay, the press of time requires us to address the propriety of the district court's issuance of CPC.

For reasons stated by the district court, we fully agree that claims 2, 3, 4, and 5 are barred because petitioner abused the writ. We find no substantial grounds upon which relief might be granted on these claims. Accordingly, we vacate the certificate of probable cause as improvidently granted. **See Cuevas v. Collins,** 932 F.2d 1078, 1082 (5th Cir. 1991).

MOTION TO VACATE STAY

In sum, on claim 1, we conclude that Herrera has failed to present a substantial ground upon which relief might be granted. **See Delo v. Stokes,** 110 S.Ct. 1880, 1881 (1990). As we stated above, the petitioner failed to allege sufficiently particularized facts to entitle petitioner to relief on his **Brady** claim. The "actual innocence" claim standing alone does not state a claim upon which habeas relief can be granted by either a federal habeas court or a Texas habeas court. We therefore find no legal justification to stay the execution to allow petitioner to litigate further in state court. Accordingly, we grant Collins's motion to vacate the stay of execution entered by the district court.

Supreme Court of the United States

No. 91-7328

Leonel T. Herrera,,

Petitioner

v.

James A. Collins, Director,
Texas Department of Criminal
Justice, Institutional Division

On Petition for Writ of Certiorari to the United States Court Court of Appeals for the Fifth Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

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No. 91-7328

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LEONEL TORRES HERRERA,
Petitioner,

v.

JAMES A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I.

Whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime for which he or she was convicted and sentenced to death?

II.

What post-conviction procedures are necessary to protect against the execution of an innocent person?

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BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported but is set forth in the joint appendix at 59-69. The opinion and orders of the United States District Court for the Southern District of Texas are also unreported and are set forth in the joint appendix at 28-58.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

Leonel Herrera, the Petitioner, is innocent of the charge for which he was convicted and sentenced to death. The district court judge afforded Mr. Herrera an opportunity to prove his innocence but the Court of Appeals would not allow the hearing and held that innocence is not a basis to stop a state execution. This Court must decide whether the Constitution provides a federal district court judge with the power to prevent the execution of an innocent person.

The Court of Appeals did not fault Federal District Court Judge Ricardo Hinojosa for his substantial concern that Petitioner was innocent. Judge Hinojosa's conclusion was well-founded, given the pre-trial, trial, and post-trial information that he reviewed.[1] That record shows that a number of circumstances surrounding Petitioner's arrest and trial were highly unusual and conducive to the risk of fact-finding error that might result in the conviction and condemnation of an innocent man. Had no after-conviction evidence of innocence been brought

[1] Judge Hinojosa was already well-acquainted with the record in Petitioner's case because he presided over the proceedings respecting Petitioner's first federal habeas corpus petition.

to light, these circumstances, albeit troubling, would perhaps have remained no more than that: their degree of deviation from constitutionally prescribed procedural norms—as well as the extent of their impact on the outcome of the trial and sentencing—would have been subject to legitimate debate. But in a case in which substantial, plausible, after-presented evidence of innocence has been brought to light, these circumstances surrounding the original trial explain how such a trial could have produced a gross miscarriage of justice and demonstrate, consistent with Judge Hinojosa's judgment, just how important it is that the Constitution provides a remedy for the miscarriage when state law does not.

In part I of this section, Petitioner details how the circumstances and atmosphere of his pre-trial and trial proceedings presented the opportunity for a wrongful conviction and sentence of death. Part II describes the inconclusive evidence of guilt presented by the prosecution at trial. In part III Petitioner sets out the post-trial evidence that supports his claim of innocence. It discloses that police involvement in the drug trade in the Rio Grande Valley along the Mexican border led to the death of two police officers. Police knew but kept silent about Petitioner's innocence rather than reveal the unseemly and incriminating police-shared responsibility for these offenses.[2] Furthermore, the actual killer's son witnessed the killings, and has sworn that his father Raul Herrera, not Leonel Herrera, committed them. A former judge and now practicing attorney in the Valley has stated un-

[2] Judge Hinojosa not only provided Petitioner an opportunity to show his innocence but also ordered an evidentiary hearing on whether the State suppressed exculpatory evidence regarding police (and police victim) offense related illegal drug-trade activity and regarding police knowledge that Petitioner did not commit the offense. (J.A. 54). *Brady v. Maryland*, 373 U.S. 83 (1963). The Court of Appeals vacated Judge Hinojosa's order staying Petitioner's execution in which Judge Hinojosa had scheduled the *Brady* hearing for three days later. (J.A. 54, 62-68).

der oath that his former client, Raul Herrera (Leonel's brother), confessed to him that he, not the Petitioner, committed the crimes. This new information is in all detail consistent with the story contained in the trial transcript with respect to how the offense occurred, consistent but for one fact—it was Raul, not Petitioner, who was at the scene.

A comparison of the post-trial evidence with the pre-trial and trial record yields a counter-intuitive result. Rather than refuting Petitioner's claims the record as a whole serves to explain how it is that an innocent person could have been convicted. For example, the trial was held in an atmosphere which under the right circumstances could lead to a wrongful conviction: two police officers killed; highly public funerals; a massive publicized effort to capture the Petitioner; an arrest akin to a military operation; a police interrogation which ended with Leonel Herrera in a coma; an inflamed and prominent law enforcement presence throughout pre-trial and trial proceedings; an angry community; flags at half-mast; a jury selected from the fallen victims' colleagues and friends; clamoring press coverage; and shaky evidence which did not point only to the Petitioner. Rather than explaining why Leonel Herrera is guilty, these factors actually complement the claim of innocence.[3]

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[3] Some of this pre-trial and trial atmosphere arose naturally upon the tragedy of these two deaths. Law enforcement activity after the offenses contributed especially prejudicial elements, however. These activities served to prevent the revelation of police complicity in an extensive drug trade that gave rise to the events responsible for the death of the two police officers. For example, immediately after the offense the police publicly designated Petitioner as the culprit, labeled Petitioner "public enemy number one," announced the largest manhunt in the history of the area to track him down, and upon his arrest beat him into a coma and left him handcuffed in the floor of his cell to die. All these events were prominently featured in the local press. Petitioner's post-trial evidence explains why the police might have wished to target and silence a scapegoat.

Other circumstances of the trial—including unreliable eyewitness testimony and an armed police officer serving on the jury—explain why Judge Hinojosa's judgment that Petitioner should be afforded a hearing was the right decision, if innocence matters. Judge Hinojosa, appointed in 1983, has presided as judge for almost a decade in the border area of South Texas where the crime occurred. Because of his knowledge of the local area and his familiarity with the record, when Judge Hinojosa considered the post-trial evidence he concluded that "out of a sense of fairness and due process" Petitioner should be afforded the opportunity to demonstrate his innocence. (J.A. at 38). Unsettling revelations—including state suppression of evidence and law enforcement's drug dealing in the Valley [4]—coupled with the extraordinary pre-trial and trial proceedings, convinced Judge Hinojosa that he should afford Petitioner an evidentiary hearing on his claim of innocence and suppression of evidence.[5] As shown in the following subsections, Judge Hinojosa's decision finds abundant support under the totality of the circumstances.

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[4] One of the leading causes for wrongful convictions is police misconduct. Huff, Rattner & Sagarin, *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinquency, 518, 528-29 (1986). There are a number of documented instances of the police "strengthening a case (either through the fabrication of false evidence or withholding exculpatory evidence) against a defendant they believe to be guilty." *Id.*; *see also* Bryan, R., *The Execution of the Innocent: The Tragedy of the Hauptmann-Lindbergh and Bigelow Cases*, 18 N.Y.U. Rev. L. & Soc. Change 831 (1991). This is especially true in cases involving the murder of a police officer. *See, e.g.*, Randall Dale Adams, *Adams v. Texas* (1990).

[5] Judge Hinojosa denied all of the claims in Petitioner's first habeas corpus action, and denied, as an abuse of the writ, claims two through five in the instant action. (J.A. 40-53) He concluded he needed more time and evidentiary development to assess the merits of claim one—the innocence and suppression of evidence claim—which is the only claim he has indicated has potential merit in Petitioner's case.

I. THE CIRCUMSTANCES OF PETITIONER'S TRIAL

A. The Offense, The Arrest, Petitioner's Beating, and The Police Funerals Were High Drama

Mr. Herrera is on death row in Texas for an offense that occurred on September 29, 1981. On that date at around 10:45 p.m. two law enforcement officers were shot within several minutes of each other at two different locations in a rural part of south Texas along the Mexico border known as "the Valley." (R. Vol. 13 at 42). Department of Public Safety Officer David Rucker was shot and killed on state highway 100 between Los Fresnos and Port Isabel, Texas. (R. Vol. 13 at 62). His body was found beside his patrol car on the highway. (R. Vol. 13 at 47). Later, Los Fresnos Police Officer Enrique Carrisalez was shot when he stopped a car for speeding just outside of Los Fresnos. (R. Vol. 12 at 42-50).[6] A purported eyewitness to this shooting, Enrique Hernandez, was sitting in Officer Carrisalez' car at the time of this shooting.[7]

Officers from all over the Valley were called to the scene of the crimes, including "City, State, and Federal agencies." (R. Vol. 13 at 63). Specifically, officers from "South Padre Island, Port Isabell [,] [t]he Cameron County Sheriff's Office . . . Federal Customs . . . Brownsville police officers . . . and DPS [Department of Public Safety] people" responded to the scene. *Id.* The Director of the Texas Department of Public Safety declared the person responsible for the deaths of officers Rucker and Carrisalez "public enemy number one." *See* "Massive

[6] Los Fresnos is a very small town with only four police officers. (R. Vol. 15 at 176). It is fifteen miles north of Brownsville, where the trial was later held.

[7] Hernandez, however, was not menaced by Carrisalez' attacker. Officer Carrisalez died nine days later following extensive surgery. (R. Vol. 14 at 136-37).

hunt on for killer," *Brownsville Herald*, Appendix 1 (hereinafter App.), [Docket Entry 1].[8] Indeed, the Director flew to the area of the crime immediately after the offense and pledged "the entire resources of the state" to the capture of the perpetrator. *Id.* Law enforcement officials came to believe that Petitioner, who had never been convicted of a violent crime, was the perpetrator, and "a massive manhunt," termed "the largest ever conducted here in recent times," *id.*, was launched to apprehend him. "Most Valley police departments . . . join[ed] the effort to apprehend the killer." *Id.*; *see also* "Suspect Captured," *Brownsville Herald*, App. 1 [Docket Entry 1] ("[T]he largest manhunt in the Valley in modern times.").

On October 2, 1981, trooper Rucker was buried in an official and elaborate police ceremony, with full military-like honors. Law enforcement dignitaries and officers from all over Texas, especially from the Valley, participated in the funeral services, with full law enforcement regalia.[9]

[8] The Appendix submitted with the petition for writ of habeas corpus is designated on the district court's docket sheet as part of docket entry 1.

[9] Troopers from all over the state came Friday to [Brownsville to] pay their last respects to one of their own—trooper David Irvine Rucker . . . . Funeral Services for the downed trooper were Friday afternoon at Harlingten's First Baptist Church.

Law enforcement officials, including about 100 Department of Public Safety Troopers, filled the small church to capacity . . . . The service was over in 30 minutes. About 100 law enforcement patrol cars, with emergency lights flashing, escorted the hearse to Brownsville's Buena Vida Cemetery for the 4:00 p.m. graveside ceremony.

There DPS director, Col. James B. Adams, presented Rucker's badge and name tag to the widow. Troopers Bud Peters and Sherwood Hamilton presented her with the Texas flag which moments earlier had wrapped the coffin.

[Continued]

On the afternoon of October 4, 1981, Petitioner was arrested near Edinburg, a small town located a short distance from Brownsville and Los Fresnos. He was arrested at the home of Gustavo and Sofia Salinas. (R. Vol. 14 at 34).[10] Responding to an anonymous call, twenty or more law enforcement officers from all over the Valley, including city, state, and federal jurisdictions, had met at the Edinberg police department, planned Petitioner's arrest, and then converged on the Salinas home. (R. Vol. 15 at 6-9).[11] Evidence was seized from Petitioner and from the residence, including a wallet (R. Vol. 15, p. 25), a set of car keys, and a letter. (R. Vol. 15 at 45). The car keys operated an automobile linked to the offense which the police had impounded several days earlier and which was regularly driven by Petitioner. (R. Vol. 15 at 41).[12]

Upon his arrest, Petitioner was taken by a small army of officers to the Edinburg police department. *Brownsville Ledger*, App. 1 [Docket Entry 1] ("The stoic Herrera was hustled into the jail by a large number of DPS

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[9] [Continued]

> About a hundred state troopers along with numerous other city and county police officers lined the cemetery. They stood at attention as the Rucker family left.

"Many Mourn Trooper's Death," *Brownsville Ledger*, App. 1 [Docket Entry 1].

[10] Judge Hinojosa presides in McAllen, Texas, approximately ten miles from where Petitioner was arrested.

[11] *See also Brownsville Ledger*, App. 1 [Docket Entry 1] ("Herrera was captured five days [after the offense] at a friend's home in Edinburg after a massive manhunt by DPS agents, Texas Ranger Bruce Casteel and various Valley police departments."); *Brownsville Ledger*, App. 1 [Docket Entry 1] ("The gang-capture of Herrera by an estimated 25 law enforcement officers . . . ended what had been described as the largest man hunt in the Valley in modern times.")

[12] As will be shown, Petitioner's brother took this automobile on the night of the offense. *See* App. 10 [Docket Entry 1].

troopers who took charge of the fugitive shortly after he was apprehended."). Several hours later, Petitioner left the police department in a hearse—bleeding, unconscious, and paralyzed, on his way to a hospital emergency room. What happened between the time Petitioner arrived at the jail and the time he departed to leave him in such a horrific state was a matter of some controversy, but the police offered the following explanation.

At the police station Mr. Bruce Casteel, a ranger with the Texas Department of Public Safety, began interrogating Mr. Herrera. "After about 20 or 30 minutes of conversation . . . . [Mr. Herrera said that] he needed to see his attorney, or an attorney," (R. Vol. 15 at 73), according to Casteel's testimony. That same evening, and some time after Petitioner refused to speak without the assistance of counsel, an Hidalgo County Assistant District Attorney, Joe K. Hendley, confronted Petitioner at the jail and screamed, "Why did you kill David [Rucker]." (R. Vol. 18 at 50-52). Hendley testified that he was speaking loud and stern, directly in Petitioner's face. (R. Vol. 18 at 47-59) ("[N]ot nose to nose, but almost."). Petitioner struck him. (R. Vol. 18 at 53.).[13] Several officers then entered the interrogation room and "restrained" Petitioner. (R. Vol. 18 at 66).[14]

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[13] Hendley was a prosecutor in neighboring Hidalgo County. The crime and the trial occurred in Cameron County. The trial judge noted:

> I think it passingly queer that some assistant district attorney in Hidalgo County got involved in this, but that's not part of this trial.

(R. Vol. 15 at 77).

Petitioner's proof now places the Hidalgo County interest in context. Part of Petitioner's post-trial proof is that law enforcement authorities in Hidalgo County, including the Sheriff, knew that Petitioner had not killed anyone and that Rucker's (and their own) involvement in the drug trade was inextricably linked to the deaths.

[14] Petitioner's version was that Hendley tortured him by holding a lit cigarette lighter under Petitioner's nose. (R. Vol. 18 at 53).

When defense counsel arrived at the jail he found Petitioner unconscious, badly beaten with fifteen to twenty marks on his body, paralyzed and handcuffed, lying on the floor of his cell. (R. Vol. 18 at 44). As evidenced by counsel's proffer to the Court, counsel quite literally had to beg the police chief to let Petitioner be taken to the hospital. Petitioner would otherwise have died in his cell. *Id.* The police provided a hearse to take Petitioner to the hospital. (R. Vol. 18 at 67).[15] Petitioner's sister arranged for a doctor to come to the hospital to treat Petitioner. (R. Vol. 18 at 91-93). According to this physician, Petitioner "was in a state of unconsciousness, unresponsive to verbal stimuli or painful stimuli;" his right eye was turned to the inside; he was "swollen in the face;" had "shallow respiration;" he "didn't have any reflexes . . . from the neck down;" and he had "a large lump on the left side [of his head] above the left ear." *Id.* "[I]f he was faking or was conscious," the doctor explained, "I cannot see how he could have stayed in there while the anesthesiologist was passing the tube down his trachea." (R. Vol. 18 at 96).[16]

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[15] Scores of police accompanied the hearse to the hospital and stood guard while the doctor examined Petitioner. (R. Vol. 13 at 93) ("[T]here were a lot of policemen, a lot of excitement going on around there.") (doctor's testimony).

[16] An emergency room physician provided similar testimony. Dr. Francisio Pena testified that Petitioner was "semi-conscious, and he was having some difficulty breathing." *Id.* at 78. He continued:

> I noticed that he did not have movement or have limited movement to the arm and in the lower extremities. He also had what we call an internal strabismus, which is an inturning—an involuntary movement of the eye when the eyeball turns inward. Also, his pupils were kind of sluggish to light reflex, and he had almost completely absent reflexes in the lower extremities.

Id. at 81. He next noted "bruises . . . around the neck" and "an area—I believe it was on the left side of his head—that looked like a bump on gross examination" *Id.* He said:

> Our main interest at that point was to go ahead and establish an airway and go ahead and start intravenous fluids, which Dr. Hadela was around the area, who was an anesthesiologist, and he was called by me to come over and help us with him. He incubated the patient . . ., inserted an endotracheal tube, which is a tube that goes through the nose, down the throat into the trachea, to maintain an open airway for adequate breathing and after that we started some intravenous fluids.

Id. Petitioner had "sluggish reflexes of the pupils," *id.*, and "it would be virtually impossible to fake those." *Id.*

This entire episode was chronicled in the press.[17] Also widely reported was the subsequent death of Officer Carrisalez. He was buried in the small town of Los Fresnos.[18] His funeral was observed town-wide—flags all over town flew at half-mast; stores throughout town closed for the services; law enforcement officials from around the state lined the walkways at the service; and a caravan of local police cars traveled to the Brownsville cemetery.[19]

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[17] *See, e.g.*, "Herrera Denied Bond," *Brownsville Ledger*, App. 1 [Docket Entry 1] ("Still clouding the capture, however, is an allegation by Herrera's wife that he was pistol whipped and beaten while being questioned by Hidalgo County Assistant District Attorney Joe K. Hendley shortly after his capture."); "[S]uspect captured," *Brownsville Ledger*, App. 1 [Docket Entry 1] (Following an "altercation with Hendley after some four hours of questioning . . . the accused killer was taken to the city hospital by a large number of police officers who also stood guard through the night.").

[18] Los Fresnos is the home town of a police officer who served on Petitioner's jury. *See* part I, B, 2, page 14, *infra*.

[19] Hundreds of residents of this sleepy town were at the churchyard an hour before the scheduled 10 a.m. services for police officer Enrique Carrisalez . . . . Los Fresnos Saturday was mourning its first loss of a police officer on duty in its history. Flags hung at half mast at most businesses along the short stretch of Texas 100 that lie within the city limits.

A few stores had closed for the duration of the church services.

Uniformed officers from as far away as Corpus Christi and Houston lined the church walkway. A small contingent of DPS troopers took their position alongside them . . . . Valley Police officers clustered with their own near their respective police vehicles and whispered to themselves.

[Continued]

These circumstances illustrate the high degree to which the Valley was inundated with information about the offense, and was enfused with sympathy for, and committed to solidarity with, the police and their fallen officers. Petitioner's post-trial evidence that the jury made a mistake is wholly compatible with this volatile atmosphere which permeated the courtroom as well as the Valley.[20]

B. Police Crowded the Courthouse and Courtroom and Occupied both Witness and Juror Chairs

As the prosecutor told the local jurors at the beginning of voir dire, "[y]ou have to be a hermit to not have heard about this case." (R. Vol. 4 at 80). And even a hermit would have quickly learned that the law enforcement community was up in arms.

1. *Prejudicial Police Presence*

Police crowded the courthouse and were visible to the jurors throughout the proceedings. One affiant who was present at trial described the atmosphere:

> I was present at every day of the trial. Each day of the trial, the Brownsville Courthouse parking lot was overflowing with marked police cars. There were

[10] [Continued]

All would later join a caravan to the Villa Nueva Cemetery on west U.S. 281, about five miles west of Brownsville where the young officer was buried.

"Slain Police Officer Buried," *Brownsville Ledger*, App. 1 [Docket Entry 1].

[20] A trial ingredient which can contribute to erroneous convictions is community passion and a trial in a mob-like atmosphere. *See* Huff, Rattner & Sagarin, *supra* note 4 at 530. One of the best examples of this type of erroneous conviction is Dr. Sam Sheppard's case. His trial, like Petitioner's, was conducted in a highly charged atmosphere. *See* J. Pollack, *Dr. Sam: An American Tragedy* (1972); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *see also Estes v. Texas*, 381 U.S. 532 (1965); *Frank v. Mangum*, 237 U.S. 309, 349 (1915) ("Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere").

> cars from the Edinburg Police Department, the Brownsville Police Department, the Department of Public Safety, Border Patrol, Los Fresnos, the Cameron and Hidalgo Sheriff's Departments, and others. . . . Every day the parking lot would get too full of cars and you would see police cars lined up along the side streets as well.
>
> Inside the courthouse, police officers wearing their uniforms were everywhere. There was nowhere you could look inside the courthouse without seeing police and sheriff uniforms . . . .
>
> Inside the courtroom where the trial took place, there were police officers in uniforms and with their guns showing, lined up at the back of the courtroom. There were also many other officers sitting in the audience.
>
> The families of the victims were present and often had officers around them. The chief of the Los Fresnos Police Department always stayed very close to Mrs. Carrisalez.
>
> In front of the audience, where the judge and the jury and Leo and the attorney were, there were at all times at least five uniformed police officers standing at attention. They carried guns. I believe they were from Brownsville. Two of these officers would stand to one side of the judge guarding a door, and the other three would stand always to one side of the jury.
>
> On the day of the sentencing, the largest number of police officers were at the trial. There was not enough seats for everyone that wanted to sit down the courtroom space was so packed. Everyone there seemed to have guns. Tension was very, very high. I remember thinking that with all of these guns and everyone on edge like they were, that if Leo didn't get the death penalty that somebody would probably shoot him right then and there.

App. 2 [Docket Entry 1].[21]

[21] The presence of a substantial number of armed officers and other questionable security practices in the courtroom may taint the

Twenty-four police officers testified at the guilt phase of the trial. Six testified at the sentencing phase.[22]

2. *Police and Friends of Police on the Jury*

Detective Joseph J. Bressler, Brownsville Police Department, (R. Vol. 9 at 102-16), served as a juror in Petitioner's case, as did friends and relatives of police officers, over the objection of Petitioner and defense counsel. The trial was in Brownsville. The slain officers had been buried in Brownsville, with the police in attendance. The Brownsville Police Department had participated with everyone in the Valley (and state-wide) in investigating the offenses. Detective Bressler lived in Los Fresnos (R. Vol. 9 p. 102), where the offenses occurred and where one of the victims was an officer. Los Fresnos was fifteen miles from the courthouse, and from Detective Bressler's police department office.

Three months and one week after the offense and burials, this local police officer sat on Petitioner's jury.[23] He pre-

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fact-finding process. In *Holbrook v. Flynn*, 475 U.S. 460 (1985), this Court acknowledged that "a roomful of uniformed and armed officers" can preclude a defendant's chances of receiving fair trial. *Id.* at 570; *see also Woods v. Dugger*, 923 F.2d 1454, 1460 (11th Cir. 1991) (holding that presence of substantial number of uniformed officers communicated following message to jury: "[T]he officers wanted a conviction followed by the imposition of the death penalty.").

[22] Police threatened the Herrera family during the trial that if they exposed the police harm would come to them. *See* Petition for Rehearing, Court of Appeals.

[23] Unknown at the time of trial was that this juror carried a gun during his juror service, a gun that was visible to other jurors. Furthermore, this juror told another juror that he knew one of the victims, contrary to what he said during voir dire. (R. Vol. 9 at 107-08). According to juror Siracusa, who served at Petitioner's trial and sentencing (R. Vol. 7 at 185), juror Bressler had a gun, told her he was a police officer, and told her he knew one of the victims. Juror Siracusa, while acknowledging the truth of these allegations, would not sign an affidavit. *See* App. 3 [Docket Entry 1].

sumably listened to and weighed the testimony of scores of witnesses who—like him—wore a police uniform. His peers, comrades, and fellow officers evinced certainty that Petitioner was responsible for the death of two police officers, and they were intent upon avenging the victims' deaths.

Petitioner made it perfectly clear that he believed that this detective should not participate in a judicial decision regarding his guilt or punishment. Tral counsel for Petitioner advised that court that

> Because of the expressions of my client, the defendant, I respectfully request the Court to grant me an additional peremptory challenge. I can understand his feeling that being accused of two formal indictments of capital murder the impossibility of having a policeman, even one as apparently sincere as Mr. Bressler is, that it's important to him.

Id. at 119. The trial judge responded that the Petitioner had exhausted his peremptory challenges and that the court was going to provide him with any more.

Detective Bressler was only one of four jurors to whom Petitioner objected, ultimately resulting in Petitioner being silenced by the Court. The trouble first began with potential juror Mike Guajardo. This juror had a cousin in Los Fresnos who was a policeman at the police department. (R. Vol. 9 at 88).[24] The next juror was Detective Bressler. The detective was followed by Ashton L. Barefoot, whose son-in-law was a police officer at the Brownsville police department. (R. Vol. 9 at 129-35). This son-in-law had had problems being assaulted by prisoners. *Id.* at 131-32.

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[24] As already explained, the victim in Petitioner's case was one of the four police officers who worked at the police department in Los Fresnos. This juror's cousin worked with, knew, and ostensibly grieved over the death of the victim, and investigated, in an official capacity, the crime involved.

Finally, petitioner found Daisy Mae Hanks to be objectionable. Ms. Hanks worked as a cook at the Beachcomber on Padre Island. *Id.* at 139. Trooper Rucker was stationed on the island, he was "a friend" of hers, *id.* at 141, and he used to drink coffee with her at the Beachcomber. She "liked him very much." *Id.* at 148. She stated that everybody talked about his death when it happened, and that "we were all dumbfounded. Everybody was." *Id.*

As noted above, defense counsel first voiced Petitioner's strong objection to the Brownsville detective. Petitioner himself also objected to the jury composition. Defense counsel gave the judge a letter from Petitioner which stated in extremely courteous and deferential language that he needed another attorney because "the handling of my jury selection has been very unfair due to [counsel's] actions and the state's as well" and because "I will use him [defense counsel Bates] as a witness to my beating during my capture." (R. Vol. 10 at 62-63). Juror questioning was interrupted as the trial court judge abruptly and without inquiry rejected Petitioner's complaints out-of-hand.[25] The Court did not address in any fashion Petitioner's concern about the jurors expressed in the letter.

After a recess, a potential juror returned to the courtroom. Petitioner then made two brief statements expressing exasperation at the apparent unfairness of the proceedings, whereupon the Court removed him from the courtroom, wrongly stating that the Petitioner had asked

[25] MR. BATES: Your Honor, he has written me a letter asking that I be fired.

THE COURT: The letter states that—it will be made a part of the record—he requests "the withdrawal of my attorney, Mr. Jim Bates." Of course, the requests will have to be denied because it would simply delay the trial.

Mr. Herrera, at this time I cannot grant it because it would serve as a delay in the trial.

(R. Vol. 10 at 60).

to be removed, and still making no mention of Petitioner's concerns.[26] The judge did not ask Petitioner any questions, he told Petitioner that Petitioner could not speak, and he banished Petitioner from the courtroom.

The Court then recited what Leonel Herrera's objections were:

> (Defendant removed)
>
> All right, the record should reflect that the defendant has been, at his own request, taken from the courtroom [27]. . . .
>
> Just before the recess there was a letter handed up by the defendant . . . . The letter reads, "Mr. Hester, Your Honor, I would greatly appreciate you consider my request for the withdrawal of my attorney, Mr. Jim Bates."
>
> "With all due respect to Mr. Bates, I have decided that the handling of my jury selection has been very unfair due to his actions and the State's as well."

[26] (Prospective juror returned)

MR. CANTU: I apologize for the state.

THE DEFENDANT: I do not consider this a trial. I consider this a lynching party. That's the way I feel.

THE COURT: Mr. Herrera, you can either sit there and listen to the trial [i.e., do not speak] or we'll put you in a cell and you can watch your trial on television, but you will not disrupt this trial.

THE DEFENDANT: I already have.

THE COURT: For the present, we're going to have you moved back into the observation room and you can stay back there and you'll see and hear the entire proceedings.

(R. Vol. 10 at 61).

[27] The record shows no request by Petitioner to be removed from the courtroom. It was entirely an action taken by the judge on the judge's own motion.

Id. at 63-64. The Court did not inquire why Petitioner belived the jury selection was unfair. The Court finished reading the letter into the record, and took a recess.[28]

After the recess, the Court made it even plainer that the Petitioner would not be heard to object about anything. The judge had allowed Petitioner to return to the courtroom, but told him not to address the Court.[29] Selection of the alternate jurors continued, was completed, and a recess was taken until the next day.

When Court resumed, the jurors had not been sworn and counsel made a motion for mistrial based upon what he contended were objections had by the Petitioner:

> MR. BATES: If your Honor please, now comes the defendant, Lecnel Torres Herrera, who is present in

[28] Before recessing, the prosecutor asked the Court to instruct the jury that Petitioner had requested that he be removed from the courtroom, which was false:

> Prior to the impaneling of the jury so that the jury might not feel that the Court has participated in doing a wrong to the defendant in the trial and that they may not consider that in their final determinations on this case, may I ask that the Court instruct the—that it was the defendant that has opted to place himself in the glass booth?

(R. Vol. 10 at 63-64.) The defendant in fact only opted to say something to the Court, whereupon the Court isolated the Petitioner. Petitioner did nothing that he could reasonably have expected would result in his being banished or in the judge refusing to allow him to speak in open Court.

[29] [THE COURT]: If you disrupt the proceedings, you will be taken to the glass enclosed booth and kept there where you can see and hear the proceedings but cannot disrupt them. It is much to your advantage to be at the table with your lawyers where you can consult and they can consult with you, but I will not allow my courtroom to be disrupted and *if you attempt to stand or speak you will be removed immediately to the booth and kept there.* Do you understand?

THE DEFENDANT: I understand.

(R. Vol. 10 at 66-67) (emphasis added).

> the courtroom, by and through me, James S. Bates, on his own behalf and moves the Court to grant a mistrial in this case . . . [because] the defendant personally feels that the selection of jurors number 9, 10, 11 and 12 were wholly unfair and unjust, as far as he is concerned. He feels that jurors number 9, Mr. Guajardo, who has a first cousin on the Los Fresnos Police Department, who was working with the deceased, Carrislaz, and is still a policeman there, was an unfair selection. Second, the juror Joe Bressler, who is an active duty criminal investigator for the Brownsville Police Department, was selected for the reason that the court did not advance a peremptory challenge to the defendant. Third, the juror Barefoot has a son-in-law who is a full-time policeman for the City of Brownsville. Fourth, Mrs. Hanks, Port Isabel, was at least a weekly coffee drinker with the deceased, Rucker, in a companion case which the State has advised the defendant and myself will be used by the State as an extraneous offense in this case.

(R. Vol. 15 at 5-6). The motion was denied.

Without regard to whether the inclusion of one or all of these jurors on Petitioner's jury was constitutional error, plainly their jury service is harmonious with Petitioner's post-trial evidence of his innocence. Just with respect to Detective Bressler, voir dire starkly illustrates that jurors affiliated with law enforcement could be more prone than other jurors erroneously to find guilt, especially in a case involving a crime against police officers.

Detective Bressler's voir dire began with his introduction by the prosecutor as "an officer with the Brownsville Police Department." (R. Vol. 9 at 102). The detective then was asked by the local prosecutor whether he could be fair:

> Q. Do you think that because you are a peace officer and the victim in this case was a peace officer

that you could be impartial in this case or do you think it would affect your serving on this jury?

A. I don't know, sir. I really—I don't know.

Q. Have you formed any opinion with regard to the defendant's guilt?

A. No, sir.

Q. When you said you don't know, can you tell me more about how you feel about that?

A. Well, sir, I just don't know. I'm not that up. I don't know.

(R. Vol. 9 at 102). Detective Bressler had himself investigated homicides, had been in scuffles in the line of duty, and had experience with investigative techniques such as dusting for fingerprints. He had been in law enforcement in the Coast Guard for ten years before becoming a civilian police officer, and he had been a fireman before that. The detective agreed that "all of [the detective's] adult life [except one year] you've been in some form of uniformed service to the public." *Id.* at 106-18.

As a result, the detective admitted that "to turn [petitioner] loose" would "be a pretty hard decision for a policeman to make," *id.* at 117, but stated that if that was what the system required, that was what he would do. But this detective also insisted that police ultimately always learn the truth about an offense and, ostensibly, tell it. This is accomplished through "[i]nvestigation, just keep going into it until the truth comes out. Eventually, it does." *Id.* at 111.

Q. Does it [the truth] always come out?

A. I think it does. I think it does. If you pursue something hard enough, it will come out.

Id. at 111. This juror then considered the testimony of scores of police officers who presumably had pursued their

investigation into the crime "hard enough" to make "the truth come[] out." [30]

II. THE EVIDENCE OF GUILT ALLOWED ROOM FOR MISTAKE

Petitioner received the death penalty for the Carrisalez case. However, the state was permitted to introduce substantial evidence about the Rucker crime during the guilt phase of the Carrisalez trial,[31] and the death penalty argument was largely predicated upon the death of two officers. For example, the medical examiner who examined both bodies testified about his findings (R. Vol. 14 at 136) ("Q. [Prosecutor] We're here to talk about David Rucker and Enrique Carrisalez. Let me start with Enrique Carrisalez."), police officers testified about both crime scenes (R. Vol. 13 at 62, 135; R. Vol. 14 at 3, 4, 90, 95, 99, 102, 122; R. Vol. 15 at 28, 39, 48), a videotape of the Rucker crime scene was introduced (R. Vol. 14 at 158; Exhibit 61), testimony about Rucker's family and his performance as a trooper was introduced (R. Vol. 15 at 30-32), and testimony that Rucker was a courteous officer was introduced. (R. Vol. 13 at 109). The entire prosecution case at both stages of trial was evidence of the two homicides.

This evidence was presented mostly through the testimony of police officers—twenty-four testified at trial, about the crime scenes, the arrest, the hospitalization, and forensic evidence.[32] Specifically the state's evidence at trial included the testimony of one eyewitness, the dying declaration of one of the victims, physical evidence from the crime scene, and evidence taken from Petitioner upon his arrest. This evidence will be taken up seriatim.

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[30] Petitioner's post-trial evidence is that the whole truth was not told at trial.

[31] The state advised the Court pre-trial that evidence of both crimes would be introduced. (R. Vol. 2 at 27).

[32] Six officers tesitfied at sentencing and discussed, among other things, Mr. Herrera's supposed bad reputation.

The "eyewitness," Enrique Hernandez, was a passenger in the Carrisalez vehicle. Mr. Hernandez was a friend of Carrisalez', and went out with him in the patrol car the night of the incident. (R. Vol. 12 at 18). He testified that they stopped a speeding vehicle and Carrisalez exited his car and approached the stopped car. (R. Vol. 12 at 40). According to the witness, a person got out of the stopped car and shot Carrisalez. (R. Vol. 12 at 50). The witness then ducked out of sight, having seen the gunman for a "a matter of seconds." (R. Vol. 12 at 51). He described the assailant as having a mustache, and identified Mr. Herrera in court as the culprit. (R. Vol. 12 at 52-53).

The Federal District Court in its opinion with respect to Petitioner's first habeas corpus proceeding was concerned about the suggestiveness of the Hernandez identification procedures. Just hours after the shooting, Hernandez was shown six photographs. Leonel Herrera's picture was in the array. Hernandez could identify none of the persons depicted in the photographs, but he did select three of the photographs and testified "you could say that it could have been any one of these, but I just wasn't sure". (R. Vol. 12 at 114). Petitioner's picture was one of the three. He did not have a mustache in the picture. (R. Vol. 13 at 7-9). Two days after the shooting, a single photograph of Petitioner was shown by itself to Hernandez, who identified Petitioner as the culprit. (R. Vol. 15 at 133-134). This picture was a mug shot of Petitioner with "Edinburg Police Department" noted on the photo, "suggest[ing] [petitioner] was already in custody." (Memorandum Opinion, Oct. 4, 1989, at 6). The witness later picked Petitioner from a lineup.[33] The District Court held that "[u]nder normal circumstances, this Court would not hesitate to find this procedure impermissibly suggestive", *id.* at 8, but sustained the procedure nonetheless because of the exigencies of the circumstances under which the police were operating.[34]

[33] Petitioner was the only person in the line-up who did not have a mustache. (R. Vol. 13 at 8-9).

The dying declaration evidence of the victim Carrisalez was similarly unreliable—only the mug shot was shown to him in his hospital room and according to the state's proof the victim then nodded. The victim spoke no words, he was on a respirator, and he had undergone extensive surgery and had earlier been narcotized with morphine and valium. (R. Vol. 15 at 156-157, 180). This was an extremely suggestive and unreliable identification procedure, and the District Court found it to be so, but sustained it. (Memorandum Opinion, Oct. 4, 1989, at 13).

The physical evidence introduced included a wallet taken from Mr. Herrera upon his arrest. It had type A blood on it (R. Vol. 15 at 85), which was Rucker's blood type and is the blood type of 42% of the population. Polson, *Essentials of Forensic Medicine* 230 (1965). Some pants taken from the residence where Petitioner was arrested had two small spots of type A blood on them. (R. Vol. 15 at 49). The keys taken from Petitioner started the automobile purportedly involved in the offense. (R. Vol. 15 at 19). A letter taken from Petitioner was intro-

[34] The single most important factor leading to wrongful convictions in the United States is mistaken eyewitness identification *See* Huff, Rattner & Sagarin, *supra* note 4 at 523; *see also United States v. Wade*, 388 U.S. 218, 229 (1967) ("[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined"); Penrod & Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, 52 Law & Contemporary Prob. 43 (1989).

duced in which he discussed, but did not confess to,[35] the homicides. (R. Vol. at 82-84).[36] A social security card with Petitioner's name on it was found several feet from Rucker's body.[37]

This evidence,[38] when considered in conjunction with Petitioner's post-trial evidence, is consistent with Petitioner's being innocent of the offense.[39]

[35] In the District Court's first opinion, the Court wrote simply that in the letter Petitioner "*essentially* admitted killing Carrisalez", (Memorandum Opinion, October 4, 1989) (emphasis added), implicitly acknowledging that the letter did not contain a confession, only something which could be so interpreted.

[36] In this letter, Petitioner referred to the fact that Rucker had been doing business on the wrong side of the law and that that was why the offense occurred. He stated that Carrisalez had been killed, but he did not say who had killed him.

This disjointed and rambling letter and Petitioner's later threatening hospital bed comments, *see* note 38, *infra*, are best understood in light of Petitioner's then unstable mental state. Petitioner's post-trial evidence is that he suffers from debilitating drug dependence, documented major mental illness, and diagnosed neurological dysfunction, *see Ex Parte Herrera*, No. TC-91-21-179 (January 14, 1991 Texas Court of Criminal Appeals) (Clinton, J., dissenting) (J.A. 16-19); *id.* at 24-27 (Maloney, J., dissenting), and so suffered at the time of his arrest. The contents of the letter and Petitioner's hospital threats are compatible with innocence when one realizes that the speaker was mentally unbalanced and was, on the one hand being tracked down, and on the other had earlier been beaten into a coma, by the police, when he purportedly made the statements.

[37] Petitioner's brother, Raul, had a set of keys to and often drove the same car Petitioner drove. Petitioner always left his social security card in this car. App. 10. [Docket Entry 1].

[38] At sentencing the state presented evidence that when Petitioner awoke in his hospital bed after his "interrogation," he threatened the police. As discussed above, upon his arrest, Petitioner invoked his right to silence. A Hidalgo County prosecutor burst in afterwards and asked in a raised voice why Petitioner had killed Rucker. According to police testimony, Petitioner knocked the prosecutor unconscious, whereupon Petitioner was "subdued" by the police. Finding him subdued, unconscious, paralyzed, bleeding, and handcuffed on the floor of his cell, Petitioner's lawyer demanded that the police take Petitioner to a hospital. When Petitioner awoke in his hospital bed and saw the people who had "subdued" him—the police—he purportedly threatened to kill the police who were there. (R. Vol. 18 at 29, 32, 34).

In Mr. Herrera's first habeas corpus action, the district court found that the prosecutor violated Petitioner's rights by interrogating him, but that the threats made by Petitioner at the hospital were far enough removed from the violation to not have been caused by it. (Memorandum Opinion at 19-22).

[39] After Petitioner's trial, and while he was awaiting trial in the Rucker case, he was again severely beaten by law enforcement officials, and hospitalized. App. 19 [Docket Entry 1]. After this beating Petitioner entered a guilty plea in the Rucker case, and in return for the plea arrangement he stated that he was guilty of the Carrisalez murder.

[40] Indeed, if the letter of "confession" introduced by the State at trial shows anything it is that Rucker was involved in the drug business. Again, the trial record complements, rather than refutes, Petitioner's claim of innocence.

III. POST-TRIAL EVIDENCE OF INNOCENCE AND STATE SUPPRESSION OF EVIDENCE, AND THE DISTRICT COURT'S STAY OF EXECUTION

According to Petitioner's allegations, the Sheriff of Hidalgo County was involved in drug trafficking. Officer Rucker, a Texas Department of Public Safety Officer, was involved with the Sheriff. The Sheriff and Rucker were involved with Petitioner, with Petitioner's brother Raul, and with Petitioner's father in the illegal drug trade.[40] Petitioner's brother, driving Petitioner's car, killed Rucker outside of Los Fresnos in Cameron County because of disagreements that developed over the illegal drug business. Officer Carrisalez was a Los Fresnos (Cameron County) police officer and he stopped Raul who was fleeing from the Rucker homicide in Petitioner's car. Raul killed Carrisalez.

Petitioner presented these allegations to the state trial court in a habeas corpus petition filed December 12, 1990. In support of his allegations he submitted the affidavit of

Hector Villarreal, a former state court judge and practicing attorney. Former Judge Villarreal swore that his client Raul Herrera, Sr., told him that he had killed both officers, that Petitioner was not present, and that the sheriff of Hidalgo County knew both that Petitioner had not committed the crime and that Rucker was shot because of his drug dealing activities.

> In 1984 I represented Raul Herrera, one of Leonel Herrera's brothers, on a charge of attempted murder. When I began representing Raul, he was being held in the Hidalgo County Jail on this charge. I obtained Raul's release on a $25,000.00 personal recognizance bond from Judge John Dominguez.
>
> Shortly after Raul was released from the Hidalgo County Jail, we met in Edinburg to discuss preparing for trial. In the course of that meeting Raul confessed to me that he, not Leonel, had killed officers Rucker and Carrisalez.
>
> In previous conversations with Raul I had been told that Raul, Leonel, and their father, Jose Herrera, were in the drug trafficking business with the Sheriff of Hidalgo County, Brigido Marmolejo. Raul and Jose were money collectors, and Leonel was a "cutter". As a cutter, Leonel's job was to cut the pure cocaine with filler in preparation for selling it. Leonel always cut the cocaine on South Padre Island. According to Raul, David Rucker the D.P.S. officer who was killed, was also involved with the drug trafficking business: his job was to act as security for the operation. Every time Leonel went to the Island, Rucker met him and gave him coveralls to wear while he was cutting the cocaine. Part of Rucker's job was to check the coveralls to insure that Leonel did not take any cocaine.
>
> Raul told me that on September 29, 1981, Leonel was supposed to have gone to South Padre Island to cut cocaine. The plan was that he would drive there with a drug dealer from the East Coast, cut the cocaine and return, as he had done in the past. However, the night before, Leonel had gotten very "coked up". That morning his nose was bleeding badly and he was in no condition to drive to the Island. Raul went in his place. Rucker was not pleased with the switch—he did not know Raul and was used to working with Leonel. Raul and Rucker had a harsh argument about the switch and the deal did not go down because of it. When Raul and the East Coast dealer were on the way back from the Island, Rucker pulled them over on FM100. Another argument ensued and Raul shot Rucker. Shortly thereafter, Raul shot Officer Carrisalez when he was stopped for speeding.
>
> Raul told me that he drove Leonel's car to the Island. He had his own set of keys to the car because he and Leonel had keys to each other's cars. Leo always kept his identification (Social Security card) in the car.
>
> Raul did not say anything about this before Leonel was convicted because he thought he would be acquitted. However, Raul told me that when Raul was convicted and sentenced to death, Raul began blackmailing Sheriff Marmolejo. According to Raul, Sheriff Marmolejo knew that Raul killed the two officers and that D.P.S. Officer Rucker was working in the drug trade because both Raul and Rucker worked for him.

App. 10 [Docket Entry 1].[41]

Leonel Herrera contended in his state habeas corpus petition that he was innocent and his execution would violate the Eighth and Fourteenth Amendments, and that

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[41] After Raul Herrera began to blackmail the Sheriff of Hidalgo County, Raul was shot in the back of the head and killed by Jose Lopez, who worked with the Sheriff in the drug trade and who was present with Raul when Raul killed the officers. App. 10, 16 [Docket Entry 1]. Lopez received probation for the homicide of Raul. App. 10. [Docket Entry 1].

the state had unconstitutionally failed to disclose exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963).[42] The State filed Respondent's Proposed Findings of Fact and Conclusions of Law on January 10, 1991, and, with respect to these claims, wrote at page nine that "'newly discovered evidence' . . . is not a proper basis for a writ of habeas corpus." The trial court denied all relief.[43]

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[42] Petitioner also presented in state court 1) the affidavit of Juan Franco Palacios, *see* App. 11 [Docket Entry 1], and the affidavit of Jose Ybarra, *see* App. 15, [Docket Entry 1], in which they swore that Raul, Sr., told them separately that he, not Petitioner, killed the officers, and 2) newspaper articles, *see* App. 12 [Docket Entry 1], reporting that the sheriff had been suspected by authorities of being involved in illegal drug trafficking. The Palacios affidavit was submitted with the State Habeas Corpus Petition. The Ybarra affidavit was submitted with the Petitioner's Reply to State's Brief in Response to Petitioner's Petition for Writ of Habeaus Corpus filed January 11, 1991, in the Texas Court of Criminal Appeals.

In addition, Petitioner filed a Motion for Discovery, a Motion for Disclosure of All Evidence Favorable to the Petitioner, and an Ex Parte Motion for Compensation of Experts and Investigator, Reimbursement of Counsel's Out of Pocket Expenses, and Continuance, all directed at enabling Petitioner further to discover and demonstrate the truth of his allegations. *See* App. 17 [Docket Entry 1]. These motions were denied.

[43] The Texas Court of Criminal Appeals then stayed Petitioner's execution and received briefs and held oral argument on Petitioner's claim based upon *Penry v. Lynaugh*, 492 U.S. 302 (1989). On May 29, 1991, that court denied relief on the *Penry* issue, and adopted the trial court's proposed order on all other issues, including the *Brady*/innocence issue. (J.A. 13-14) Rehearing was denied September 18, 1991. The Texas Court of Criminal Appeals stayed issuance of its mandate until December 17, 1991, to allow a petition for writ of certiorari to be filed in this Court. A petition was timely filed on December 17, 1991. Thereupon the lower court once again set an execution date. On February 5, 1992, Petitioner sought a stay of execution in the Texas Court of Criminal Appeals. The request was denied February 11, 1992. Petitioner sought a stay of execution in this Court February 12, 1992. That request was denied February 18, 1992.

On February 13, 1992, Petitioner filed a Motion for Appointment of Counsel, For an Ex Parte Hearing in Order to be Afforded the Services of Investigators, and For a Stay of Execution, in the district court. (District Court Docket Number 92-004) [Docket Entry 1]. The motion was denied because no petition was pending. Petitioner filed a petition for writ of habeas corpus in the district court on February 16, 1992, and renewed his motion for funds.

In his petition for writ of habeas corpus, Petitioner presented additional evidence of innocence.[44] Most strikingly, he presented the affidavit of Raul Herrera's son, who swore that he witnessed the killings and that Leonel Herrera did not commit them:

> 1. I am Raul Herrera, Jr. I am the nephew of Leonel Herrera, and the son of Leonel's brother Raul Herrera. On September 29, 1981 I witnessed the murders of two police officers who were killed in the Rio Grand Valley. At that time I was nine years old. The first one, whose name I later found out was David Rucker, was shot near Port Isabel, Texas, and the second one, whose name I later found out was Enrique Carrasalez, was shot while we were on our way home to Edinburg. He was shot near Los Fresnos. My father, Raul Herrera, shot both of the men. A man named Chavello Lopez was also in the car when my father shot the men. At that time, my father and Chavello were best friends and business partners. They were together almost all the time. My Uncle Leonel was not present with us when my father killed the officer. Only myself, Chavello and my

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[44] The evidence was also included in Petitioner's Motion for Ex Parte Hearing in which Petitioner explained the difficulty of investigating law enforcement misconduct in the Valley and sought the assistance of an investigator pursuant to the Anti-drug Abuse Act of 1988. (District Court Docket Number 92-004) [Docket Entry 1].

father were in the car when the shootings happened. . . .

3. I knew at that time that my grandfather and father and my Uncle Leonel were in a drug business together with some other people in the valley and I knew that they worked dealing drugs for the sheriff of Hidalgo County . . . .

Then we drove to near Port Isabel where my father killed the first officer. My father actually did the driving. Chavello sat in the front seat next to my father, and I rode in the back seat of the car. The officer that was killed met us at a rest stop off the highway. My father pulled the car over first. He told me to stay down in the car. Then he got out of the car and spoke to the officer and then he shot him. My father got back in the car and we drove away.

6. We were driving back toward Edinburg when we were pulled over by another police officer. My father pulled over the car and opened the driver's side door. He stepped half way out of the car and shot several times. At that time I hid on the floor between the front and back seats of the car . . . .

8. I told a police officer about my father having been the one that shot the police officers and not my Uncle Leonel, but he told me never to say anything about it again.

App. 16. [Docket Entry 1]. The district court judge denied relief on five of Petitioner's claims, finding them to constitute an abuse of the writ. (J.A. at 40-53). But as to the claim of innocence the district court judge entered a stay of execution. (J.A. at 52-53). The district court judge also determined that an evidentiary hearing and a stay of execution was necessary with respect to the *Brady* claim, and he supplemented his stay order and scheduled an evidentiary hearing for three days later. (J.A. at 54-55).

The state sought to vacate the stay, arguing that innocence was irrelevant. *See* Respondent-Appellant's Motion to Vacate Stay of Execution and Expedite Appeal at 8 ("[A] claim of newly discovered evidence . . . [is] clearly not cognizable . . . ."). The Court of Appeals agreed, and vacated the stay of execution. (J.A. at 68-69). This Court granted certiorari on February 19, 1992, and the Texas Court of Criminal Appeals stayed Petitioner's execution.

SUMMARY OF ARGUMENT

The Court of Appeals did not quarrel with Leonel Herrera's evidence that he did not commit the murder for which he was convicted and sentenced to death. The panel held that "Herrera's assertion of 'actual innocence' presents no . . . claim for relief." (J.A. at 67.) Petitioner contends that the promises made by the Eighth and Fourteenth Amendments should not be so empty. Nothing is more barbaric, is more shocking to the conscience, or is more at odds with contemporary standards of fairness—the touchstones of the Eighth and Fourteenth Amendments—than gratuitously to execute an innocent person. This Court should not countenance such an affront to human dignity.

Texas provides Petitioner with no forum to present his claim. The door to prevent a wrongful execution is permanently sealed to an inmate thirty days after trial in Texas. Because the State of Texas has chosen not to provide a death sentenced inmate with any corrective process whatsoever, the district court properly should have entertained Petitioner's claim of actual innocence pursuant to its federal habeas corpus jurisdiction. This result is compelled not only by the Eighth and Fourteenth Amendments, but also by this Court's emerging consensus that the primary purpose of federal habeas corpus is to provide a "safety valve" for the extraordinary case of the innocent defendant, i.e., to prevent fundamental miscarriages of justice.

ARGUMENT

I. THE EXECUTION OF AN INNOCENT PERSON VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Society Recoils At the Execution of Innocent Persons

The Eighth Amendment "expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man." *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring). It protects "nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958); *accord Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976) (plurality opinion of Stewart, Powell, & Stevens, JJ.) ("[T]he basic concept of human dignity [is] at the core of the Amendment.").[45]

The Fourteenth Amendment also protects citizens against unconscionable state action. It declares: No person shall be deprived of "life, liberty or property without due process of law." Though the majestic phrase "due process" eludes precise definition, it is always violated when a particular state action "shocks the conscience,"

[45] *See also Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) (Habeas corpus "recogniz[es] the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty."); *id.* ("[H]abeas corpus . . . [is] a remedy for 'whatever society deems to be intolerable restraints. . . .'") (citation omitted). "Punishment may be 'cruel and unusual' because of its barbarity or because it is 'excessive' or 'disproportionate' to the offense," *Spaziano v. Florida*, 468 U.S. 447, 477 (1984) (Stevens, J., concurring in part and dissenting in part) (footnote omitted), if it is "abhorrent to currently existing moral values," *Furman v. Georgia*, 408 U.S. 238, 333 (1972) (Marshall, J., concurring), "if citizens found it to be morally unacceptable" *id.* at 332, if it is "inhuman and barbarous," *In re Kemmler*, 136 U.S. 436, 447 (1890), or if it "shocks the conscience and sense of justice of the people." *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952) (internal quotations omitted).

Rochin v. California, 342 U.S. 165, 172 (1952) (Frankfurter, J.), when it violates "civilized standards," *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 468 (1947) (Frankfurter, J., concurring), or when "a principle of justice 'rooted in the traditions and conscience of our people'" is offended. *Id.*, 329 U.S. at 470 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Mr. Herrera's case presents this Court with the most profound issue confronting a civilized society: Does the Constitution countenance the state's power to execute an innocent citizen? Or, more fundamentally: Does the moral authority of any state extend so far? Every citizen would instinctively reply "No" if asked whether the State could, consistent with the Constitution, execute a person who the State suspects is innocent. Preserving the life of an innocent person wrongly convicted is the irreducible promise the state makes to the individual when he or she consents to enter organized society. It is a promise that comforts every rational person in this and all other countries. Any nation of laws without a commitment to this immutable principle sacrifices its moral authority. It breaches the social contract.

Hence society recoils at State execution of an innocent person. Such a barbaric act is "at odds with contemporary standards of fairness and decency," *Spaziano*, 468 U.S. at 465, and would be "bound to offend even hardened sensibilities." *Rochin*, 342 U.S. at 172; *see also Pulley v. Harris*, 465 U.S. 37, 68 (1984) ("The execution of someone who is completely innocent . . . [is] the ultimate horror case.") (Brennan, J., dissenting) (quoting John Kaplan, *The Problem of Capital Punishment*, 1983 U. Ill. L. Rev. 555, 576) (internal quotations omitted).[46] "The infliction

[46] Sir John Fortescue relayed the story of a judge who allowed a person to be executed. It subsequently came to light that the person was innocent. Fortescue remarked of the judge: "[N]ever in his life would he purge his mind of that deed of his." John Fortescue, *De Laudibus Legum Anglie* 135 (1490). The Attorney Gen-

of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering." *Furman*, 408 U.S. at 279 (Brennan, J., concurring).

B. This Court's Jurisprudence Reflects Society's Collective Conscience And Requires Procedures Which Will As Much As Is Humanly Possible Prevent the Execution of An Innocent Person

The "natural abhorrence civilized societies feel at killing," *Ford v. Wainwright*, 477 U.S. 399, 409 (1986), an innocent person requires that the law remove that possibility as much as is humanly possible. This abhorrence finds expression in this Court's Eighth Amendment, Fourteenth Amendment, and habeas corpus jurisprudence. First, as a matter of substantive Fourteenth Amendment law, "no person may be punished criminally save upon proof of some specific criminal conduct," *Schad v. Arizona*, —— U.S. ——, 111 S. Ct. 2491, 2497 (1991), beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979). A vast array of due process protections helps to assure that no innocent person is convicted of a crime.[47]

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eral for Texas from 1983 to 1991 feared this "abhorrent" possibility: "My worst nightmare would have been the execution of an innocent person." Jim Mattox, "On Not Executing an Innocent Prisoner," *N.Y. Times*, Apr. 3, 1992, at A28.

Charles Dickens opposed the death penalty due to the "possibility of mistake," *Selected Letters of Charles Dickens* 215 (David Paroissien ed., 1985), as did Jeremy Bentham. *See* Jeremy Bentham, 1 *Works of Jeremy Bentham* 447 (John Bowring ed., 1843). While the reasons that the rest of the western world abolished capital punishment vary somewhat among nations, one common thread is the fear of executing an innocent person and public reaction to the execution of innocent persons. *See, e.g.*, Elizabeth Tuttle, *The Crusade Against Capital Punishment in Great Britain*, 106-20 (1961); Edna Nixon, *Voltaire and the Calas Case* (1961); Ludovic Kennedy, *Ten Killington Place* (1961).

[47] *See, e.g., Coy v. Iowa*, 487 U.S. 1012 (1988) (defendant has the right to confront witnesses against him); *Taylor v. Illinois*, 484 U.S. 400 (1988) (defendant has right to present witnesses in his own defense); *Strickland v. Washington*, 466 U.S. 668 (1984) (defendant has right to the effective assistance of counsel); *In re Winship*, 397 U.S. 358 (1970) (state must prove defendant's guilt beyond a reasonable doubt); *United States v. Wade*, 388 U.S. 218 (1967) (defendant has right to counsel at post-indictment lineup); *Brady v. Maryland*, 373 U.S. 83 (1963) (state has affirmative duty to disclose exculpatory evidence); *In re Murchison*, 349 U.S. 133 (1955) (defendant is entitled to a fair trial before impartial tribunal).

Despite these protections, it is common (and tragic) knowledge that mistakes are made in criminal trials. "[O]ur system of criminal justice does not work with the efficiency of a machine—errors are made and innocent as well as guilty people are sometimes punished. . . . [T]he sad truth is that a cog in the machine often slips: memories fail; mistaken identifications are made; those who wield the power of life and death itself—the police officer, the witness, the prosecutor, the juror, and even the judge—become overzealous in their concern that criminals be brought to justice." Foreword, Jerome Frank & Barbara Frank, *Not Guilty* 11-12 (1957).

Regardless, "arriving at the truth is a fundamental goal of our legal system." *United States v. Havens*, 446 U.S. 620, 626 (1980) (citing *Oregon v. Hass*, 420 U.S. 714, 723 (1975)). "'[T]he twofold aim [of criminal law] is that guilt shall not escape or innocence suffer.'" *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1934)). Whenever the state discovers a mistake has been made the laws must allow corrective action.

[48] "The death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective

Second, as a matter of substantive Eighth Amendment law, "a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death," *Cabana v. Bullock*, 474 U.S. 376, 386 (1986), and if such a sentence is imposed the "Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence," *id.* at 386, and "prevent the execution . . ." *Id.* at 390; *cf. Tison v. Arizona*, 481 U.S. 137, 158 (1987) (absent "major participation in the felony committed, combined with reckless indifference to human life," death penalty prohibited).[48]

Third, innocence gives special life to claims that might otherwise be forfeited in federal habeas corpus proceedings. Federal habeas corpus is, at bottom, "governed by equitable principles." *Fay v. Noia*, 372 U.S. 391, 438 (1963) (citation omitted). The most basic equitable principle is that courts must prevent a fundamental miscarriage of justice. *Cf. McCleskey v. Zant*, —— U.S. ——, 111 S. Ct. 1454, 1471 (1991). The execution of an innocent person is the paradigm of a fundamental miscarriage of justice. It is fair to say that this Court's federal habeas corpus jurisprudence over the last fifteen years has become increasingly concerned with protecting innocent persons. In *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), for example, Justice O'Connor observed that "our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas relief." *Id.* at 313 (citations omitted). Similarly, in *Harris v. Reed*, 489 U.S. 255 (1989), three members of this Court acknowledged that in habeas corpus there must be a "kind of 'safety valve' for the 'extraordinary case' " of the factually innocent defendant. *Id.* at 271 (O'Connor, J., concurring); *see also McCleskey*, 111 S. Ct. at 1471 (The ends of justice "require[] federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of actual innocence.' The miscarriage of justice exception serves as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.' ") (citation omitted); *Stone v. Powell*, 428 U.S. 465, 491 n.31

offenders." *Gregg*, 428 U.S. at 183 (opinion of Stewart, Powell, & Stevens, JJ.) (footnote omitted). Executing innocent persons would not deter crime, and because retribution has as its benchmark "that punishment should be directly related to the personal culpability of the criminal defendant," *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), obviously there is no retribution in executing an innocent person. Such an execution could serve no other function than the gratuitous infliction of suffering.

(1976) (recognizing that habeas corpus ensures that no "innocent man suffer an unconstitutional loss of liberty"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 257-58 (1973) Powell, J., concurring) ("[T]he central reason for habeas corpus [lies in] the affording of means of . . . redressing an unjust incarceration.")[40]

These and other cases describe the central purpose of federal habeas corpus as remedying the nearly ultimate injustice: incarceration of an actually innocent defendant. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 495 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas corpus court may grant the writ even in the absence of a showing of cause for the procedural default."). *A fortiorari*, habeas corpus lies to prevent the ultimate punishment—taking the life—of an innocent person.

In sum, this Court's Eighth and Fourteenth Amendment expressions delimit the bedrock principle that an innocent person should not suffer society's ultimate punishment. Because executing an innocent person would be repugnant to any civilized person and would serve no societal purpose, to do so would entail "the gratuitous infliction of suffering," *Gregg*, 428 U.S. at 183 (opinion

[40] A corollary of these decisions is that the need for finality of criminal judgments must yield when the case involves an innocent defendant. *See, e.g., McCleskey*, 111 S. Ct. at 1471 (holding second habeas corpus petition must be addressed on merits where petitioner makes "colorable showing of actual innocence"); *Schneckloth*, 412 U.S. at 257 (" '[W]here *personal* liberty is involved, a democratic society . . . insists that it is less important to reach an unshakable decision than to *do justice*. . . .' ") (footnote omitted) (emphasis added by Powell, J., concurring); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970) ("The policy against . . . executing an innocent man . . . should far outweigh the desired termination of litigation.") (footnote omitted) (internal quotations omitted).

of Steward, Powell, & Stevens, JJ.), and would violate the Eighth and Fourteenth Amendments.

II. BECAUSE THE STATE OF TEXAS DOES NOT PROVIDE A DEATH-SENTENCED INMATE A MEANINGFUL POST-TRIAL OPPORTUNITY TO DEMONSTRATE HIS OR HER INNOCENCE, FEDERAL HABEAS CORPUS RELIEF MUST BE AVAILABLE

As the Court of Appeals noted, the state of Texas provides no post-trial procedure for raising a claim of innocence. (J.A. at 67.) A claim based upon newly discovered evidence of innocence must be raised within thirty days of trial in Texas, or it is forever barred.[50] Thus innocence, even if proved beyond all doubt, is simply not remediable by any Texas court.

Where, as here, state corrective procedures are absent with respect to federal constitutional claims as fundamental as Mr. Herrera's claim of innocence, federal courts must act. *See Jennings v. Illinois*, 342 U.S. 104, 111

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[50] Texas courts have construed the time limits strictly. Motions for new trial must be filed and amended "within the said 30 days and not thereafter." *Dugard v. State*, 688 S.W.2d 524, 530 (Tex. Crim. App. 1985), *overruled on other grounds by Williams v. State*, 780 S.W.2d 802 (Tex. Crim. App. 1989). In fact the thirty day limit is jurisdictional: "a trial judge ha[s] no jurisdiction to entertain an out of time motion for new trial." *Beathard v. State*, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989); *see also Drew v. State*, 743 S.W.2d 207, 223 (Tex. Crim. App. 1987); *Ex parte Drewery*, 677 S.W.2d 533, 536 (Tex. Crim. App. 1984).

Texas habeas corpus law also prohibits Mr. Herrera from raising his innocence claim. The Texas post conviction statute substantively bars applicants from raising claims of newly discovered evidence. *Ex parte Binder*, 660 S.W.2d 103, 106 (Tex. Crim. App. 1983). This bar even applies to newly discovered evidence claims relating to the guilt of the defendant. *See Ex parte May*, 717 S.W.2d 84, 88 (Tex. Crim. App. 1986) ("The existence of newly discovered evidence relevant to the guilt of the applicant is not a ground for relief in a post-conviction writ of habeas corpus."); *accord Banspach v. State*, 91 S.W.2d 365 (Tex. Crim. App. 1936).

(1951) ("[W]here the state does not afford a remedy, a state prisoner may apply for a writ of habeas corpus in the United States District Court . . . ."). [51] In other words, as Professor Bator noted, pursuant to even the most restrictive view of federal habeas corpus, "if the totality of the state procedures allegedly did not provide rational conditions for inquiry into federal-law (or indeed, state-law) questions, . . . federal habeas jurisdiction may appropriately examine the allegation . . . ." *See* Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 457 (1963) (footnote omitted). [52]

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[51] *See also Hawk v. Olson*, 326 U.S. 271, 276 (1945) ("When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right.") (citation omitted); *Ex parte Hawk*, 321 U.S. 114, 118 (1944) ("[W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised . . . because the state affords no remedy . . . a federal court should entertain his petition for habeas corpus, else he would be remediless.") (citations omitted); *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935) (federal habeas corpus jurisdiction obtains when state has failed to provide corrective process).

[52] The Court of Appeals, in reliance upon *Townsend v. Sain*, 372 U.S. 293, 317 (1963), held that federal habeas corpus could provide no remedy for Petitioner's predicament. *Townsend* contains language which suggests that if newly discovered evidence is "merely . . . relevant to the guilt of a state prisoner," and not to the "constitutionality of the [prisoner's] detention," habeas relief is unavailable. *Id.* But Petitioner's challenge is to his unjust execution, not his conviction, and "[i]n capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases." *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in the judgment); *see also California v. Ramos*, 463 U.S. 992, 1009 (1983) (discussing the "concern . . . regarding the risk of an unwarranted conviction"). As put by the Court, "death is different." *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (Death is "most irremediable and unfathomable of penalties."); *Ramos*, 463 U.S. 998-99 ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing deter-

Federal habeas corpus review of claims not cognizable in state collateral proceedings is critical in capital cases due to the unique and irrevocable nature of the penalty of death. "Death is different" and this difference requires a correspondingly higher degree of reliability in the fact-finding process. *Ford*, 477 U.S. at 411; *see also Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (State procedures cannot create "an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through whim . . . or mistake."). Furthermore, the state's obligation to provide meaningful and

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mination."); *Gardner v. Florida*, 430 U.S. 349, 357 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in this country.").

Thus, a remedy that may be unavailable to an imprisoned person may be available for a death-sentenced inmate. Consequently, Respondent's and the lower court's reliance upon *Townsend* in support of the argument that newly discovered evidence challenges to *convictions* are not cognizable in federal habeas corpus begs the question.

Townsend is not controlling for many other reasons. First, of course, the language in *Townsend* regarding newly discovered evidence is dicta. Second, while *Townsend* was a capital case, it was decided before this Court's numerous decisions establishing a heightened degree of reliability on fact-finding procedures in capital cases. *See, e.g., Ford*, 477 U.S. at 411. Third, the petitioner in *Townsend* did not assert his innocence, or allege that it was unconstitutional to execute an innocent person. Petitioner is asserting that it violates the Eighth and Fourteenth Amendments to execute him because he is innocent. Thus, the newly discovered evidence of innocence in Mr. Herrera's case is relevant to the constitutionality of his detention. Fourth, the state of Townsend's conviction, Illinois, provided him with an opportunity to present an assertion of innocence. *See People v. Dabbs*, 23 N.E.2d 343 (Ill. 1939). As noted previously, Texas does not.

Several courts of appeal have rejected the part of *Townsend* relied upon by the lower court. *See, e.g. Sanders v. Sullivan*, 863 F.2d 218, 225 (2d Cir. 1988); *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991). Furthermore, it is significant to note that even Judge Friendly thought this aspect of *Townsend* was incorrect. *See* Friendly, *supra*, 38 U. Chi. L. Rev. at 159, n.87.

reliable procedures does not end at trial. Some issues raised post-trial require relief. Rational and reliable post-trial mechanisms must be provided to defendants raising such claims.[53] *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Ford*, 477 U.S. at 411 ("If the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard of truth that befits a decision affecting the life or death of a human being."). Evidence of innocence, like incompetency to be executed, should be considered when presented.[54]

Thus under these circumstances the only rule consistent with the core Eighth Amendment principle that an innocent person may not be executed is that claims of inno-

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[53] The state may argue that an assertion of innocence can be remedied through executive clemency. Clemency is not a substitute because the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Furthermore, as this Court stated in *Ford*, clemency is not adequate because it is the Governor's subordinates that are trying to carry the execution out. Thus, in a capital case, the "vindication of a constitutional right [may not] be entrusted to the unreviewable discretion of an [executive-] administrative tribunal." *Ford*, 477 U.S. at 416.

[54] In this regard, it is important to keep in mind that petitioner is asserting two different violations of his right to due process of law (as well as a violation of the Eighth Amendment). The first is his substantive due process right not to be executed because he is in fact innocent of the offense. *See supra* at pages 32-38. The second, set forth here, is a procedural due process right. The Due Process Clause places upon the states the obligation to afford a defendant a full system of meaningful remedies. If not afforded, then a federal court has the obligation to intervene. *See generally Harris, supra*, 489 U.S. at 268. (O'Connor, J., concurring) ("[I]n determining whether a remedy for a particular constitutional claim is 'available,' the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim").

cence are cognizable in federal habeas corpus proceedings. This is an especially necessary rule given the widely accepted view that federal habeas corpus acts as a "safety valve" for innocent defendants, *see Harris*, 489 U.S. at 271 (O'Connor, J., concurring), and the acknowledged fact that Petitioner has no state court remedy. This rule would dispose of the dispute before this Court, and would allow the lower court an important initial opportunity to hear the evidence and resolve the merits of Petitioner's claim.

The constitutional claim Mr. Herrera presented to the district court is as sensitive as it is fundamental—a claim of innocence, a claim that the crime was committed by someone else, and a claim that the local law enforcement officials engaged in illegal activity and coverup both before, during and after the trial of this case. While the issue of whether the constitution prohibits executing innocent persons is straightforward, as is the corresponding requirement that federal courts carefully review the issue in the absence of a state corrective process, the application of this rule to specific cases is singularly a function of facts. While determining facts is similarly straightforward, it is traditionally a matter for a trial level court, and under these circumstances this case should be remanded.[55]

As a general rule, the prudent course in developing constitutional doctrine, especially on issues as fundamental as the one presented here, is first fully to air all

[55] The district court was poised to address the issues, having stayed the execution on the basis of the claim presented here and having promptly scheduled an evidentiary hearing on Petitioner's *Brady* claim. The district judge's familiarity with the criminal justice system as it is administered in South Texas and his knowledge of the culture of the communities in that area undoubtedly will and should inform the exercise of discretion in addressing Mr. Herrera's claim. *See Granberry v. Greer*, 481 U.S. 129, 136 (1987) (recognizing that many issues in habeas corpus cases should be resolved in first instance by lower federal courts due to their greater "familiarity with state criminal practice").

aspects of the issue. *See United States v. C.I.O.*, 335 U.S. 106, 126 (1948) (Frankfurter, J., concurring) (counseling against formulating principles of "constitutional law broader than is required by the precise facts of the situation . . . .") (citations omitted); *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (extolling "wisdom of allowing difficult issues to mature through full consideration" in lower court proceedings). In these circumstances, the course long followed by this Court is to announce the constitutional rule and then allow the lower courts to apply it in light of the allegations made. *See Keeney v. Tamayo-Reyes*, 1992 U.S. Lexis 2690, *17 (May 4, 1992) (adopting cause-and-prejudice standard for determination of whether federal habeas corpus petitioner entitled to evidentiary hearing and remanding case to district court for application of newly-adopted standard); *C.I.O.*, 335 U.S. at 126 (observing that it is inadvisable to make broader pronouncements than necessary where issues "come here not so shaped by the record and by the proceedings below as to bring [the claims] before this Court as leanly and as sharply as judicial judgment . . . requires") (Frankfurter, J., concurring); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); *City of Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 169-72 (1927).[56]

If the Court wishes to delineate some rough initial parameters for application below, several considerations are important. First, what must one do to establish a claim for relief? Second, once the claim is properly pled, what procedures must be afforded to decide the issue?

[56] This is precisely the approach followed in *Ford*. Once the underlying constitutional question regarding the execution of the insane was settled, the combined opinions left for the lower courts to delineate "the precise limits that due process imposes in this area." *Ford*, 477 U.S. at 427 (Powell, J., concurring).

As to the first consideration, perhaps the best articulation of a restrictive but workable standard is found in Judge Friendly's seminal article. According to Judge Friendly, in order to prevail on a claim of innocence an inmate would have to show a fair probability that in light of all the evidence—including the evidence that is newly discovered—the trier of fact would have entertained a reasonable doubt of his guilt. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970).[57]

As for procedures, what is required by due process will likely as an initial matter depend upon the corrective procedures provided by the state courts. If a state provides a death sentenced inmate with a meaningful, full and fair opportunity to present the claim, then perhaps a federal court's role is more limited. At a minimum, a fundamental requisite of due process is "that an individual is entitled to an 'opportunity to be heard.'" *Ford*, 477 U.S. at 430 (O'Connor, J., concurring) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). The core requirements of an opportunity to be heard include: an impartial fact-finder; the right to present relevant evidence; and, the right to challenge the evidence offered by the opposing party. Petitioner has never been afforded these basic safeguards in connection with his compelling claim of innocence, and they should be provided in the district court.

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[57] This is similar to the standard utilized by several federal courts of appeal. The Second Circuit uses a "would likely affect the verdict" standard. *Sanders v. Sullivan*, 863 F.2d 218, 225 (2d Cir. 1988). The Third Circuit uses a "would probably produce an acquittal on retrial standard." *De Martino v. Weidenburner*, 616 F.2d 708, 711 (3d Cir. 1980), as does the Eighth Circuit, *Lewis v. Erickson*, 946 F.2d 1361, 1362 (8th Cir. 1991), and the Ninth Circuit. *Quigg v. Crist*, 616 F.2d 1107, 1112-13 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980).

CONCLUSION

For all these reasons, the judgment of the United States Court of Appeals should be reversed and this case should be remanded to the district court.

Respectfully submitted,

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

LEONEL TORRES HERRERA,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime for which he or she was convicted and sentenced to death.

2. What post-conviction procedures are necessary to protect against the execution of an innocent person.

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No. 91-7328

IN THE
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OCTOBER TERM, 1991

LEONEL TORRES HERRERA,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein ("the Director"), by and through the Attorney General of Texas, and files this Brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was delivered on February 18, 1992, and is published as *Herrera v. Collins*, 954 F.2d 1029 (5th Cir. 1992). JA 59.[1]

[1] "JA" refers to the Joint Appendix. "SR" refers to the statement of facts of Herrera's trial, with the volume designated by Roman numeral and the page by Arabic number. "Tr." refers to the transcript of Herrera's trial. "Ex." refers to the exhibits that are contained in the appendix submitted to the federal district court with Herrera's petition for writ of habeas corpus.

JURISDICTION

Herrera invokes the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Herrera bases his claims upon the Eighth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings Below

By an indictment filed on October 14, 1981, Herrera was charged in the 197th District Court of Cameron County, Texas, with the capital murder of Enrique Carrisalez, a peace officer acting in the lawful discharge of an official duty. TEX. PENAL CODE ANN. §19.03(a)(1). On his plea of not guilty, a jury found Herrera guilty as charged in the indictment on January 20, 1982. On January 21, 1982, after a separate hearing on punishment, the jury affirmatively answered the two special issues submitted to it pursuant to Article 37.071 of the Texas Code of Criminal Procedure. Thereafter, in accordance with Texas procedure, the trial court assessed Herrera's punishment at death. Herrera's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals, which affirmed on October 31, 1984, and denied rehearing on January 16, 1985. *Herrera v. State*, 682 S.W.2d 313 (Tex. Crim. App. 1984). This Court refused certiorari review on May 28, 1985. *Herrera v. Texas*, 471 U.S. 1131 (1985).

Herrera's execution was scheduled for August 16, 1985. On July 26, 1985, Herrera filed an application for a writ of habeas corpus pursuant to Texas Code of Criminal Procedure art. 11.07 (Vernon Supp. 1991) in the convicting court, which recommended on July 25, 1985, that relief be denied. On

August 2, 1985, the Texas Court of Criminal Appeals denied relief. *Ex parte Herrera*, Application No. 12,848-02 (Tex. Crim. App. 1985).

On August 7, 1985, Herrera filed a petition for habeas corpus in the United States District Court for the Southern District of Texas, McAllen Division. On October 23, 1989, the court concluded that Herrera had failed to make a showing of a denial of a federal constitutional right as required under 28 U.S.C. § 2254 and denied Herrera's federal habeas corpus petition. *Herrera v. McCotter*, No. B-85-343 (S.D. Tex. 1989). The judgment was affirmed on June 25, 1990, *Herrera v. Collins*, 904 F.2d 944 (5th Cir. 1990), and certiorari was denied by this Court on October 15, 1990. *Herrera v. Collins*, ___ U.S. ___, 111 S.Ct. 307 (1990).

On October 30, 1990, the trial court issued a warrant setting Herrera's execution for December 17, 1990. Herrera filed an application for a second state writ of habeas corpus and a motion for stay of execution on December 12, 1990. The following day, the trial court modified Herrera's execution date to January 23, 1991. On January 2, 1991, the trial court recommended that relief be denied. On January 14, 1991, the trial court withdrew its January 2nd order, entered findings of facts and conclusions of law, and denied relief.

On January 17, 1991, the Texas Court of Criminal Appeals ordered the cause filed and set argument on Herrera's allegation that the Texas capital sentencing scheme did not allow the presentation or consideration of constitutionally mitigating evidence. The Court of Criminal Appeals denied relief on May 29, 1991, on the basis of the trial court's findings and conclusions and denied rehearing on September 18, 1991. *Ex parte Herrera*, 819 S.W.2d 528 (Tex. Crim. App. 1991).

Following the issuance of mandate from the Court of Criminal Appeals, the trial court scheduled Herrera's execution for February 19, 1992. On December 17, 1991, Herrera filed a

petition for writ of certiorari in this Court to review the state court's denial of collateral relief. The petition was denied on February 19, 1992. *Herrera v. Texas*, ___ U.S. ___, 112 S.Ct. 1074 (1992).

On February 16, 1992, Herrera filed a second petition for federal writ of habeas corpus in the district court, raising five claims for relief. The district court dismissed all but the first of these claims as an abuse of the writ. JA 33-53. The district court initially granted summary judgment for the Director with respect to the part of Herrera's first claim that was based on *Brady v. Maryland*, 373 U.S. 83 (1963), on the ground that insufficient facts were presented to support his assertions. JA 52. The district court retained jurisdiction with respect to the remaining portion of Herrera's first claim, which related to his assertion of innocence. *Id.* The order did not indicate that the district court credited the claim of actual innocence; rather, the court's objective in retaining jurisdiction was to allow Herrera to present the claim of innocence in a proper manner to the state courts. JA 52-53. The district court also ordered a stay of execution pending a hearing, at which time the district court intended to dismiss the federal habeas petition if Herrera had filed an appropriate pleading in state court. JA 52. Subsequently, on Herrera's motion filed February 18, 1992, pursuant to Federal Rule of Civil Procedure 59(e), the district court allowed Herrera to amend his petition, withdrew that portion of the earlier order that dealt with allegations of *Brady* violations, and set an evidentiary hearing on Herrera's contention of *Brady* violations and actual innocence. JA 54.

Thereafter, on February 18, 1992, the United States Court of Appeals for the Fifth Circuit vacated the stay of execution on the Director's motion and denied relief on all claims. *Herrera v. Collins*, 954 F.2d 1029 (5th Cir. 1992).[2] On

[2] In the evening of February 18, 1992, Herrera sought rehearing of the Fifth Circuit's denial of relief, raising for the first time a February 17, 1992, affidavit of Raul Herrera, Jr., whose January 29, 1992, affidavit

(footnote continued on next page)

February 19, 1992, without delineating the questions it wished to consider, this Court granted Herrera's petition for writ of certiorari. *Herrera v. Collins*, ___ U.S. ___, 112 S.Ct. 1074 (1992). In Herrera's brief to this Court, he posed the issues as follows:

1. Whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime for which he or she was convicted and sentenced to death.

2. What post-conviction procedures are necessary to protect against the execution of an innocent person.[3]

After this Court granted Herrera's petition for a writ of certiorari, the Texas Court of Criminal Appeals stayed Herrera's execution.

(footnote continued from previous page)
formed the primary basis for Herrera's *Brady* and "innocence" claims in his petition. Despite its availability, Herrera did not offer this subsequent affidavit as support for his Rule 59(e) motion in the district court. The Court of Appeals denied the motion for rehearing in a minute order entered in the late evening of February 18, 1992.

[3] In his original petition for a writ of certiorari, Herrera framed the questions as follows:

1. Does it violate the Eighth and Fourteenth Amendments to execute a person who has been convicted of capital murder but is innocent?

2. If so, must state courts provide a meaningful mechanism for hearing claims of actual innocence in death penalty cases?

3. What procedures are necessary in federal court for adjudicating claims of actual innocence in a death penalty case?

B. Statement of Facts

1. Evidence of Herrera's Guilt

Shortly after 10:50 p.m. on September 29, 1981, a private citizen, Richard Dickinson, found the body of Texas Department of Public Safety (DPS) Officer David Rucker lying in the road beside his patrol car on Farm to Market Road (FM) 100 about 6.2 miles east of Los Fresnos, Texas. SR XIII 62, 65, 71, 120-21.[4] After using the patrol car's radio to call for help, Dickinson saw Leonel Herrera's Social Security card lying near the trooper's body. SR XIII 121-22, 124.[5]

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[4] Rucker's duties with the Department of Public Safety were accident investigation and traffic enforcement. SR XIII 64. Prior to Richardson's arrival on the scene, at least two civilian witnesses observed a member of the DPS engaged in traffic control in the area of Trooper Rucker's death, and he issued a speeding ticket to Alberto Munoz in the same area at 10:39 p.m. SR XIII 101, 107-109, 114.

Rucker was killed by a perforating gunshot wound from a bullet that entered the head behind and slightly above the right ear. SR XIII 65, 103, 123; XIV 140-145. The muzzle of the gun was one to two feet from his head when it was fired. SR XIV 141, 151. In addition to this major injury, there was an irregular cut in the skin of the bridge of Rucker's nose, and the bones of the nose were fractured, possibly as the result of a blow to the face before the bullet was fired into the head. SR XIV 147. Several buttonholes on the front of Rucker's uniform were slightly torn, as though there had been a struggle. SR XIV 139, 146-147, 152; XV 6. Although Rucker was wearing a gunbelt, it was empty, and the holster was in an odd position, pulled away from the body, as though the pistol had been removed from the holster after he had fallen to the ground. SR XIII 66-67, 123; XIV 162-163; XV 4. Rucker's partner, who was not with him on the night of the murder, testified that certain items that were normally located in their patrol car were missing after the murder, including a nightstick and a slapper. SR XIII 137-138.

[5] Guadalupe Rosales, a constable with Cameron County, also saw the Social Security card in the roadway about seven feet from the body. SR XIII 128, 130-131.

Shortly before 10:54 p.m. on the night of Rucker's murder, Los Fresnos Police Officer Enrique Carrisalez observed a speeding vehicle traveling west on FM 100 toward Los Fresnos away from where Rucker's body was found. SR XII 27, 41-44. A civilian, Enrique Hernandez, was riding with Officer Carrisalez at the time. SR XII 20.[6] When the speeding car went directly in front of the patrol car, Hernandez, who was sitting in the front seat, saw only one person in the vehicle. SR XII 28-29, 66.

Carrisalez activated the lights on the patrol car and followed the speeder, who stopped for 30 to 32 seconds at a red light, at which time the police unit was only a couple of feet behind his car. SR XII 29, 40-41. While the vehicles were stopped at the intersection, Hernandez saw the driver look at them in his rear view mirror and make a hand motion indicating that he would pull over. SR XII 30, 44. Both vehicles then turned left and stopped. SR XII 30, 41-42. As the patrol car turned at the intersection and pulled up behind the speeder, Officer Carrisalez told the police dispatcher the license number of the car he was stopping. SR XII 42-43.

Carrisalez parked two or three feet behind the speeder's car, at an angle so that the high beams of the patrol unit illuminated the driver's side of the speeder's car. SR XII 42, 44, 46, 104. The overhead flashing lights also were still operating. SR XII 42. Hernandez had such a clear view of the interior of the car that he could see a sharp object approximately an inch long, which perhaps was a shark's tooth, hanging directly under the mirror. SR XII 44.

At 10:54 p.m., Carrisalez took his flashlight and walked toward the speeder's car, stopping near the back tire on the

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[6] Hernandez had received special training in the military in the observation and identification of aircraft. SR XII 14-17, 72-78. He had ridden with police officers, usually at night, about twice a month for the past eight years and had witnessed a number of arrests. SR XII 20-22; XIII 14.

driver's side. SR XII 44-45. By the time Carrisalez reached that point, the speeder had his car door open and was leaning out and looking back at the officer. SR XII 46-47, 91. Hernandez saw the men say something to each other, but he could not hear what was said. SR XII 47. Carrisalez took two or three steps backward. SR XII 47. At the same time, through the back window of the speeder's car, Hernandez saw the speeder reach for something around the middle of the car seat. SR XII 48, 91. The speeder got out of the car, took two or three steps toward Officer Carrisalez, drew his hands together in front of him, and fired one or more shots. SR XII 48-50. Hernandez saw Carrisalez twist down to his right side. SR XII 50. Carrisalez, who had been shot in the chest, died nine days later from the wound. SR XIV 137-38. Hernandez made an emphatically unequivocal in-court identification of Herrera as the person he saw shoot Carrisalez. SR XII 54; XIII 30.

When the shots were fired, Hernandez ducked down in the seat of the patrol car. SR XII 50. He remained leaning down on the seat for no longer than four to five seconds, then sat up just far enough to look over the dashboard to see what was happening. SR XII 54. He saw Herrera get back into his car and drive away. SR XII 54-55. Hernandez used the police radio to call for assistance. SR XII 56-57.

Prior to the shots, Hernandez observed Herrera at the side of his car from a distance of fifteen to sixteen feet for a period of approximately 14 seconds with the lights illuminating him. SR XII 51, 102. Hernandez could see Herrera's expression, which was one of "anger and concentration." SR XII 68-70, 108.[7]

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[7] Hernandez observed Herrera closely enough to describe him as being six feet to six feet two inches tall, as weighing 165 to 180 pounds, and as wearing a light-colored or white shirt and dark pants. SR XII 52, 106-107. His complexion was light brown like someone of Spanish descent, his black hair was short and clean cut, and he had a light moustache, like an overnight growth. SR XII 52-53, 107.

On October 1, Los Fresnos Police Chief Ruben Garcia and Officer Richard Gonzales showed Officer Carrisalez a photograph of Herrera. SR XV 162, 168-69.[8] Carrisalez was unable to speak because of the tubes in his mouth, but when Gonzales held the picture where he could see it, Carrisalez nodded his head affirmatively. SR XV 162, 168-69, 179. When Garcia then asked Carrisalez whether he was sure that this was the man who had shot him, Carrisalez nodded. SR XV 169, 179.[9] After seeing the picture of Herrera, Carrisalez became very agitated and had to be sedated. SR XV 178, 180.[10]

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[8] When Carrisalez was in the ambulance on the way to the hospital, he told the paramedics that he was going do die, SR XV 143-146, and he was aware during the period of his hospitalization that he was extremely ill. SR XV 152. Prior to showing him the photograph, Gonzales had heard that Carrisalez had a stroke. SR XV 161. Although Carrisalez was on a respirator throughout his hospitalization, he was conscious and fully aware of his surroundings during the first several days. SR XV 151.

[9] Carrisalez recognized the men when they came to his bedside, and he knew what he was doing. SR XV 163, 169. A nurse, who was present when the photograph was shown to Carrisalez, testified that although he was in critical condition at the time, he knew what was happening; he had not been sedated and was not under the influence of drugs at the time the picture was shown to him. SR XV 178.

[10] The Texas Court of Criminal Appeals ruled that the identification procedure utilized with respect to Carrisalez was not unduly suggestive, and that the identification was based on Carrisalez' independent recollection. *Herrera v. State*, 682 S.W.2d at 319. The federal district court agreed that, while the display of a single photograph to Carrisalez was suggestive, it was not impermissibly suggestive under the circumstances. Second Amended Memorandum October 23, 1989 at 13. The district court held that "there can be little doubt as to the reliability of Carrisalez' identification." *Id.* at 14. After incorporating the factual findings of the Texas Court of Criminal Appeals, the district court concluded that the "showing of a single photograph did not create a substantial likelihood of misidentification." *Id.* at 15. The Fifth Circuit agreed. *Herrera v. Collins*, 904 F.2d at 949.

Later that same day, Garcia showed the single photograph of Herrera to Hernandez. SR XV 170-71.[11] Hernandez had been shown a photo array on the morning after the shooting, but did not identify anyone. SR XII 80, 108-09; XV 96-97. Instead, he picked three pictures, including Herrera's, as looking like the shooter. SR XII 109-14; XIII 24. He wanted to be absolutely sure before he made an identification, and Herrera's hair was longer in the photo array than it had been the night of the shooting. SR XIII 24. Subsequently, on October 6, Hernandez viewed a second photo array and selected Herrera's picture. SR XIII 33-34. Hernandez also attended a physical lineup on October 24, at which time he recognized Herrera as soon as he stepped into the observation area. SR XII 80-81, 115; XIII 3-7, 21-22; XV 94-95, 99.

Through the license tag number, law enforcement agencies determined that the person who had shot Officer Carrisalez was driving a 1978 Cougar automobile that was registered to Leonel Herrera. SR XIII 146-47.[12] When a chemist

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[11] The Texas Court of Criminal Appeals concluded that the showing of a single photograph to Hernandez was required by exigent circumstances and was not unduly suggestive. *Herrera v. State*, 682 S.W.2d at 317-319. The state court further concluded that, even if the procedure was impermissibly suggestive, Hernandez' in-court identification was based on an independent origin and therefore was admissible. *Id.* at 319. The federal district court concluded that the showing of a single photograph had been suggestive but that, because of the circumstances existing in this case, it was not impermissible. Second Amended Memorandum October, 23, 1989 at 8-9. After analyzing the totality of the circumstances, the district court further concluded that the showing of the single photograph to Hernandez did not create a substantial likelihood of misidentification. *Id.* at 10-13. The Fifth Circuit agreed with the conclusions of the district court. *Herrera v. Collins*, 904 S.W.2d at 947-948 & n.2.

[12] Once the vehicle was identified, Herrera's residence was placed under surveillance. SR XIII 147-153; XIV 5-7. At approximately 3:00 in the morning after the murders, Edinburg police found the car in the driveway at 1116 Samano and talked with Oralia Morales, the person who lived there. SR XIV 7-8. Morales said that she had seen Herrera with the car on the

(footnote continued on next page)

for the Department of Public Safety examined Herrera's car at 7:30 a.m. on the morning after the shooting, there were splatters of Type A human blood, which were less than 24 hours old, on the hood, the left front fender, and the grill on the front bumper of the car. SR XIV 27-30, 52, 62. In addition, there was Type A human blood on the right arm rest of the driver's seat, the left front of the passenger seat, the gas pedal, and the driver's floormat. SR XIV 36-38, 59. Trooper Rucker had Type A blood. SR XIV 50. Herrera had Type O blood. SR XIV 36.

In addition, the DPS chemist found a hair on the floormat of the car that was coated in some places with blood and contained tissue adhering to the roots, which indicated that the hair was pulled out as opposed to falling out. SR XIV 38-39, 43-44, 60-61. After microscopically comparing the hair from the floorboard with hairs from Rucker and Herrera, the chemist concluded that the hair had the same physical characteristics as some of Rucker's hair, but it was a different color and had a different internal structure than Herrera's hair. SR XIV 39, 42-43.

Patricia Hulen, a forensic serologist with the Department of Public Safety, conducted additional tests on the blood that was obtained from Herrera's car. SR XIV 77, 81-83. She determined that the blood on the floormat was identical to Trooper Rucker's blood type (Type A) and enzyme group. SR

(footnote continued from previous page)
previous morning, but she had not seen him afterward and did not know how the car had gotten into her driveway. SR XIV 9. Although Morales owned the car, she did not have a set of keys to it. SR XIV 9-10. She gave the officers written permission to take the car from her driveway to McAllen to process it for evidence. SR XIV 9-11. The officers noticed blood both on the inside and the outside of the car. SR XIV 8-9, 13-14. Later in the morning, after the car had been photographed and processed by the chemist, DPS investigator Joel Young found the imprint of a gun under the rug on the passenger side of the front seat. SR XIII 15-18. Personal papers in Herrera's name were found in the glove compartment of the car. SR XIII 20-21. When Enrique Hernandez subsequently saw the impounded car, he identified it as the one that had been involved in the shooting. SR XII 59-62.

XIV 36, 85. Herrera has both a different blood group (Type O) and a different enzyme profile. SR XIV 36, 85. Only 6% of the population (and only 4% of the Mexican-American population) has blood in the particular combination of blood group and enzyme group that was found on the floormat. SR XIV 88, 90.

Herrera was arrested on October 4, 1981, at a house in Hidalgo County, Texas, which is west of and contiguous to Cameron County, where the murders occurred. SR XV 7. The owner of the house, Gustavo Salinas, consented to a search of the residence. SR XV 19. From the floor of the laundry room, the police recovered a pair of Herrera's blue jeans that contained a set of keys to the 1978 Cougar he had been driving. SR XV 19-21, 36-38, 40-41.

Drops of blood on the leg of the jeans that were recovered in the laundry room were tested by DPS chemist Robertson and found to be Type A human blood. SR XIV 57-58; XV 48-49, 52.[13] Robertson also found spots and smears of Type A human blood inside Herrera's wallet, which was in his rear pocket when he was arrested. SR XV 25, 50. The blood appeared to have dropped into the wallet. SR XV 51.

During a physical search of Herrera after he was arrested, the police recovered a letter from his hip pocket. SR XV 45, 70-72.[14] Subsequent analysis demonstrated that prints from the middle finger of Herrera's left hand and his left index finger were on one page of the letter and the envelope in which this letter was contained. SR XV 107-10. In relevant part, the letter said:

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[13] There also was human blood on a white pullover shirt and a blood smear on the back of the heel of a right shoe that were given to Robertson for analysis, but he was not able to classify it. SR XIV 58.

[14] Following the arrest, when Texas Ranger Bruce Casteel was talking with Herrera at the Edinburg Police Department, Herrera told Casteel that, in order to understand what happened on the night of September 29, 1981, he should read this letter. SR XV 71-72.

To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future's problems with problems from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that's the way it is.

I'm not a tormented person. I am sane in every way. . . .

I believe in the law. What would it be without this men that risk their lives for others, and that's what they should be doing -- protecting life, property, and the pursuit of happiness. Sometimes, the law gets too involved with other things that profit them. The most laws that they make for people to break them, in other words, to encourage crime.

What happened to Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes.

My personal life, which has been a conspiracy since my high school days, has nothing to do with what has happened. The other officer that became part of our lives, me and Rucker's (Tatum), that night had not to do in this. He was out to do what he had to do, protect, but that's life. . . .

If this is read word for word over the media, I will turn myself in; if not, don't have millions of men out there working just on me while others -- robbers, rapists, or burglars -- are taking

advantage of the law's time. Excuse my spelling and writing. It's hard at times like this.

SR XV 82-84.

After being convicted of the murder of Officer Carrisalez, Herrera pled guilty on July 6, 1983, to the murder of Trooper Rucker.[15]

2. Herrera's Newly Presented Evidence

To establish his claim of innocence, Herrera relies on affidavits from four people: (1) a hearsay affidavit from Hector Villarreal, an attorney who represented Raul Herrera, Sr. ("Raul, Sr."), one of Herrera's brothers, in 1984 -- two years after Herrera's trial -- to whom Raul, Sr., allegedly confessed to the capital murders; (2) a hearsay affidavit prepared in 1991 from Juan Palacios, who states that while they were in jail together in 1984, Raul, Sr., said that he and not Herrera murdered the police officers; (3) a hearsay affidavit prepared in 1991 in which a friend of the Herrera brothers, Jose Ybarra, Jr., states that in 1983 Raul, Sr., said that he was the one who killed the two law enforcement officers; and (4) an affidavit prepared in 1992 in which Herrera's nephew, Raul Herrera, Jr. ("Raul, Jr."), states that he and a man named Chavello Lopez were in the car when his father, Raul, Sr., who died in 1984, shot the two police officers.

The hearsay affidavits of Palacios and Ybarra provide no details as to the alleged commission of the offense by Raul

[15] Herrera implies that he pled guilty because he was beaten by officers at the Texas Department of Criminal Justice on June 21, 1983. Significantly, however, he has never challenged his conviction for the murder of Trooper Rucker on the ground that his plea was coerced or involuntary. Herrera's plea was not entered until July 6, 1983, some two weeks after the altercation. The affidavits that Herrera provided to the district court made no connection between the alleged beating and the plea of guilty, and the two incidents are so attenuated in time as to belie any linkage.

Herrera, Sr. The affidavits of Hector Villarreal and Raul Herrera, Jr., are irreconcilably inconsistent.

Villarreal averred that Raul, Sr., told him there were two people--himself and an unnamed East Coast "drug dealer"--in the car when Rucker and Carrisalez were murdered. Ex. 10 at 2. According to Raul, Jr., there were three people in the car: himself, his father and Chavello Lopez, Raul, Sr.'s, best friend and business partner. Ex. 16 at 1.

According to Villarreal, Raul, Sr., told him that Leonel Herrera's job as part of the Herrera family cocaine ring was to "cut" the drug on Padre Island, which lies in the Gulf of Mexico just off the southern tip of Texas, and he and the East Coast dealer were driving west from Padre Island when the murders of Rucker and Carrisalez took place between the Cameron County towns of Port Isabel and Los Fresnos. Ex. 10 at 2. See Appendix A, a map of the area. According to Raul, Jr., the Herrera vehicle was eastbound from the Hidalgo County town of Edinburg to Port Isabel, which is between Los Fresnos and Padre Island, when the murders were committed. Ex. 16 at 3.

According to Villarreal, Raul, Sr., told him that "Rucker pulled them over," and Raul, Sr., shot him after they argued. Ex. 10 at 2. According to Raul, Jr., Rucker "met us at a rest stop" before he was killed. Ex. 16 at 3.

Finally, Raul, Jr., averred that (1) at the time of the murders, Leonel Herrera was with Raul, Jr.'s, grandmother and Aunt Norma at their home on Eighteenth Street in Edinburg, and (2) his father talked to Leonel Herrera's common-law wife, Lali, that night after the murders. Ex. 16 at 3-4. These assertions are significant because "Aunt Norma," Norma H. Rodriguez, has executed two affidavits that Herrera has tendered in support of his application for federal habeas relief. In the first affidavit, executed on December 7, 1990, she states that "I saw Leo on the day the murders happened. It was early in the day. . . ." Ex. 8 at 7. There is no mention that she possessed knowledge of any

alibi defense. In the second affidavit, executed on December 10, 1990, she made no statement regarding Leonel Herrera's whereabouts on the night of the murders. Ex. 2. In addition, both the grandmother, Maria Torres Herrera, and the common-law wife, Oralia Morales, submitted affidavits in support of Herrera's federal petition, Ex. 4 & 6, both of which are silent as to the events recounted in Raul, Jr.'s, affidavit.

SUMMARY OF ARGUMENT

Herrera is not an innocent man but one who has been found guilty beyond a reasonable doubt by twelve jurors following a trial that conformed with the requirements of the Constitution. His newly discovered evidence of alleged innocence is incredible and inconsistent with undisputed trial evidence as well as internally inconsistent.

The failure of the state to afford Herrera a post-trial procedure in which to relitigate his guilt offends no existing guarantee of the Eighth Amendment or due process. Herrera's claim of actual innocence is directed to the guilt-innocence inquiry and does not implicate the Eighth Amendment, which by its terms concerns only matters of bail and punishment and, in the capital sentencing context, guarantees procedures designed to insure reliable assessment and appropriate imposition of death sentences. Due process was satisfied by the state's introduction of evidence sufficient to satisfy a rational jury beyond a reasonable doubt of the existence of every element of the offense. The Constitution does not guarantee post-trial review of convictions, much less a post-trial procedure by which a court can reassess the jury's determination of guilt in light of belatedly proffered evidence.

Existing procedures in the state and federal courts, as well as the clemency and commutation powers of the executive branch, adequately assure that an innocent person will not be convicted, sentenced to death, and executed. The limitations placed by Texas on the post-trial consideration of newly

discovered evidence relevant to guilt as a basis for upsetting a conviction are in accord with the contemporary practice of the majority of states, and there clearly is no historical precedent for post-trial assessment of the sufficiency of the evidence based on newly discovered evidence relevant to guilt.

Executive clemency is the appropriate vehicle to prevent an inappropriate imposition of a death sentence and to achieve justice in situations where doubt as to guilt cannot result in reversal or a new trial under existing legal standards. Unconstrained by evidentiary rules and procedure, the executive authority is free to grant clemency to someone like Herrera whose claim of actual innocence is undermined by the fact that his newly discovered evidence is predominantly hearsay testimony of family members and acquaintances, and is both internally inconsistent and inconsistent with the uncontroverted evidence offered at trial.

The post-conviction review sought by Herrera would necessitate an unwarranted expansion of both substantive and procedural protections. With respect to the ultimate issue at the state trial, the question of an individual's guilt or innocence of a state offense, the Court already has struck the appropriate balance between federal and state interests and the requirements of federalism. The federal courts can assure the rationality of the trial outcome by reviewing the sufficiency of the evidence. A determination of a state prisoner's "real" or "actual" guilt of a state offense based on a post-trial proffer of newly discovered evidence is both the most intrusive into the states' power to regulate procedures under which its laws are carried out and the least necessary exercise that a federal habeas court could undertake.

If, despite the considerable interests militating against such consideration, the Court determines that the Eighth Amendment requirement of heightened reliability and the finality of a death sentence require consideration of claims based solely on newly discovered evidence relevant to guilt,

review should be limited to those cases where the state fails to provide a procedure by which a death-sentenced inmate can obtain a new trial upon showing by clear and convincing evidence that newly discovered evidence of actual innocence (1) was unavailable at the time of trial and at the time of all prior writs, (2) would be admissible upon retrial, and (3) is such that upon retrial no reasonable juror could find him guilty of the capital offense. If the state does provide such a procedure, further inquiry by the federal courts is unwarranted.

Regardless of the standard applied to Herrera's claim of actual innocence, his evidence is so incredible and inconsistent that it cannot rationally be considered to be probative of actual innocence.

ARGUMENT

I.

HERRERA HAS NOT BEEN DENIED ANY OF THE PROTECTIONS SECURED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

Herrera does not come before this Court as an innocent man, but rather as one who, after being tried and afforded an opportunity to raise all available defenses to his conviction, has been found guilty beyond a reasonable doubt by the unanimous vote of twelve jurors. "The purpose of the trial from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." *Ross v. Moffitt*, 417 U.S. 600, 610 (1974). The presumption of innocence therefore no longer applies to Herrera. Thus, the question posed by Herrera, "[w]hether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime" for which he was convicted and sentenced to death, does not accurately reflect the issue presented by his case.

There is no possibility in Herrera's case that an innocent man has been convicted of a crime that he did not commit. Evidence of Herrera's guilt of the murder of Enrique Carrisalez is overwhelming, *see Herrera v. State*, 682 S.W.2d at 320, and every court that has reviewed his conviction and evaluated his constitutional claims has found that he received a fair trial.[16]

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[16] In his "Statement of the Case," Herrera attempts to create the impression that his arrest was the result of police corruption, that his trial was conducted in an atmosphere of adverse publicity, and that he was convicted by jurors who were prejudiced against him. This description is inaccurate.

Herrera's allegations of police corruption rely on newspaper clippings that make no reference at all to the instant case and do not contain even a hint of police complicity in drug activity in South Texas prior to 1985 -- three years after Herrera's trial. Further, the newspaper clippings relate to Hidalgo County; they contain nothing to suggest that anyone who testified at Herrera's trial or participated in his arrest, or any officials in Cameron County, where Herrera's trial occurred, have ever been involved in any wrongdoing.

Herrera's allegation that his trial was conducted in an atmosphere of prejudicial publicity is likewise incorrect. The federal district court, in ruling upon Herrera's first state petition, considered this issue in the context of a claim of ineffective assistance of counsel that was premised in part on the attorney's failure to request a change of venue and his alleged failure to conduct *voir dire* with respect to pretrial publicity. The district court concluded that pretrial publicity had not undermined the fairness of Herrera's trial. Second Amended Memorandum October 23, 1989, at 31-32. The district court further found that each of Herrera's jurors was examined regarding actual or potential prejudice toward him and that each of them demonstrated an ability to be impartial. *Id.* at 34.

Likewise, the district court rejected Herrera's claims that he was prejudiced because a police officer and friends of police officers served on his jury. After considering this claim, the federal district court concluded that Herrera's argument is "centered on mere speculation . . . unsubstantiated by any evidence or law." JA 41, 43. The district court further noted that Herrera had not presented this claim in his first federal habeas petition and that nothing had prevented him from doing so. JA 42. This conclusion coincided with the factual findings of the state trial court. JA 6.

The evidence of "innocence" that Herrera proffers to the Court some ten years after his trial is contrary to the trial testimony, the physical evidence in the case, his own admissions with respect to the offense, and his plea of guilty to the related murder of Trooper David Rucker. Moreover, the affidavits that Herrera has belatedly presented to the courts are so incompatible with the trial evidence and so self-contradictory that they are, quite simply, incredible.

Herrera was identified as the gunman by two eyewitnesses, an identification that was corroborated by his own written statement as well as a wealth of circumstantial evidence. The credibility of his latter-day assertion of innocence is completely undermined by his guilty plea to the murder of Trooper Rucker, a crime that is inextricably linked to the murder of Officer Carrisalez not only by Herrera's written statement but also by the fact that blood of Trooper Rucker's relatively rare type was found on and inside the vehicle driven by the gunman who shot Carrisalez and on Herrera's wallet. The affidavits of family members and acquaintances, proffered in support of the theory that Herrera's dead brother, Raul, Sr., murdered Officer Carrisalez, are so inconsistent that they cannot be credited. The affidavits of Villareal and Raul, Jr., differ both as to the number and identity of the individuals who were allegedly with Raul, Sr., and as to the direction in which Raul, Sr., was driving when the murders were committed. Further, the affidavits are contradicted by Hernandez' testimony that there was only one person in Herrera's vehicle. Finally, the affidavits do not explain Herrera's failure to offer alibi testimony of his mother and aunt at trial or why his brother's alleged identity as the murderer was not disclosed shortly after his brother's death in 1984.

Thus, the question before this Court is not whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent, but rather, whether those amendments require the establishment of special post-trial procedures by which a convicted defendant may, at any time

after trial, belatedly assert new evidence in an attempt to retry the guilt-innocence issue. Herrera inexcusably waited for more than nine years after his conviction to present his alleged evidence of innocence to a court and did so only on the eve of his execution. At issue are the time limitation imposed by the State of Texas on the filing of a motion for new trial and the failure of the state and federal courts in habeas review to provide a forum for challenges to the sufficiency of the evidence based on a post-trial proffer of newly discovered evidence.

A. The Eighth Amendment applies to issues of punishment, not issues of guilt-innocence.

The Eighth Amendment, in its entirety, states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Amendment, by its terms, therefore concerns only matters of bail and punishment.[17] In the capital sentencing context, the Eighth Amendment imposes procedural safeguards designed to secure "the reliability of the process by which the death penalty has been imposed," *Murray v. Giarratano*, 492 U.S. 1, 8-9 (1989), and procedures outside the sentencing phase have only been found to implicate the Eighth Amendment where they impact on the reliable assessment or the appropriate imposition of a death sentence. *See Ford v. Wainwright*, 477 U.S. 399 (1986) (the Eighth Amendment assures the reliable ascertainment of a prisoner's sanity as a predicate to lawful execution); *Beck v. Alabama*, 447 U.S. 625, 642-43 (1980) (when a capital jury is forced into an all-or-nothing choice between finding a defendant at once guilty of capital murder and sentencing him to death or finding him innocent and releasing him, there exists an impermissible risk of an unreliable assessment of sentence); *see also Schad v. Arizona*, 501 U.S. ___, ___, 111 S.Ct. 2491,

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[17] Summaries of the background and history of the Amendment confirm that its application has been limited to matters of punishment. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 169-72 (1976); *Furman v. Georgia*, 408 U.S. 238, 316-28 (1972) (Marshall, J., concurring).

2504-05 (1991). Herrera does not cite a single case in which this Court's application of the Eighth Amendment reflects concerns other than the reliable assessment or appropriate imposition of punishment, and the Director has found none.

The Eighth Amendment proscription against cruel and unusual punishment assumes that a conviction has occurred, and issues with respect to guilt-innocence are outside the scope of this Amendment. The gravamen of Herrera's complaint, however, is not that he has been inappropriately punished, but rather that he should never have been convicted in the first place. Because this is an issue of Herrera's guilt, and not an issue with respect to the punishment he received, it is not cognizable under the Eighth Amendment.

Contrary to Herrera's argument, *Ford* does not support the proposition that Eighth Amendment concerns of heightened reliability require a reviewing court to redetermine guilt whenever a death-sentenced inmate proffers newly discovered evidence in an attempt to establish reasonable doubt as to his guilt. In *Ford*, the Court noted the ancient prohibition on execution of the insane and that no state permitted executions under such circumstances, and therefore concluded that the Eighth Amendment prohibits the state from inflicting the penalty of death upon a prisoner who is insane. *Id.* at 410. The Court then found that certain procedural protections adhere to the determination of competency to be executed. *Id.* Unlike the situation presented in *Ford*, Herrera's claim of newly discovered evidence is at most relevant only to the guilt determination. His assertion that his death-sentenced status entitles him to relitigate his guilt after trial is entirely without historical precedent. Unlike the determination of competency to be executed, which is appropriately made near the time of a scheduled execution, a determination of guilt-innocence necessarily becomes less accurate with the passage of time from the offense. *Ford* simply does not support Herrera's argument that his death-sentenced status is sufficient, without more, to transform an issue with respect to the guilt-innocence determination into an Eighth

Amendment concern. *See also Franklin v. Lynaugh*, 487 U.S. 164, 174, 187 (1988) (residual doubt about guilt is not mitigating evidence which must be considered at the sentencing phase of a capital trial).

B. Herrera was not denied the process due under the Fourteenth Amendment.

The Fourteenth Amendment guarantee of a fundamentally fair trial secures to defendants those procedures necessary to a reliable determination of guilt. Herrera was denied none of the procedures identified by existing precedent as being essential to the fundamental fairness guaranteed by the Fourteenth Amendment. Indeed, Herrera does not attempt to identify any deprivation of the process due with respect to either the trial or his first appeal as of right.

Due process with respect to sufficiency of the evidence was satisfied when the jury found Herrera guilty beyond a reasonable doubt. "[*In re*] *Winship* [397 U.S. 358 (1970)] presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof--defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). While due process requires that there be sufficient evidence to support a conviction, there is no authority for the proposition that evidence may be rendered insufficient by a post-trial proffer of evidence made in a belated attempt to establish doubt as to guilt. Post-trial claims of actual innocence based on newly proffered evidence never have been held to state a basis for relief independent of a denial of process or other constitutional violation. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

Moreover, the Constitution is not implicated by the limitations on review of Herrera's claim imposed by Texas procedures governing motions for new trial and state habeas

corpus. The Constitution does not guarantee post-trial review of convictions, much less a post-trial procedure by which a court can reassess the jury's determination of guilt in light of belatedly proffered evidence. While, where a state chooses to afford defendants a first appeal as of right, the due process and equal protection provisions of the Fourteenth Amendment require certain procedures to secure a fair and even-handed review, *see, e.g., Evitts v. Lucey*, 469 U.S. 387, 398-99 (1985) (and cases cited therein), the Court has made clear that, not only are "[s]tate collateral proceedings . . . not constitutionally required as an adjunct to state criminal proceedings," if a state provides for collateral review, due process does not secure the same procedural protections as those on direct appeal. *Murray v. Giarratano*, 492 U.S. at 10; *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

II.

NO ADDITIONAL PROCESS IS REQUIRED BECAUSE EXISTING PROCEDURES ASSURE THAT AN INNOCENT PERSON WILL NOT BE CONVICTED, SENTENCED TO DEATH, AND EXECUTED.

The decision whether a particular practice violates the fundamental fairness guaranteed by the Due Process Clause is informed by historical and contemporary practice as well as recognized principles of fundamental fairness. *Medina v. California*, ___ U.S. ___, No. 90-8370, slip op. at 8-9 (June 22, 1992); *Schad v. Arizona*, 501 U.S. at ___, 111 S.Ct. at 2500 (plurality opinion). However, beyond the specific guarantees enumerated in the Bill of Rights, the requirements of due process are limited to the most basic procedural safeguards. *Medina v. California*, ___ U.S. at ___, slip op. at 7-15; *Patterson v. New York*, 432 U.S. 197, 210 (1977). "[I]t is normally 'within the power of the State to regulate procedures under which its laws are carried out, . . .' and its decision in this

regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Medina v. California*, ___ U.S. at ___, slip op. at 7, *quoting Patterson v. New York*, 432 U.S. at 201-02 (citations omitted).

The limitations placed by Texas on the post-trial consideration of newly discovered evidence relevant to guilt as a basis for upsetting a conviction are in accord with the contemporary practice of the majority of states. In addition to Texas, thirty-three other states and the United States strictly limit the time in which a defendant may present a motion for new trial based on newly discovered evidence. *See* Appendix B.[18] Moreover, there clearly is no historical precedent for post-trial assessment of the sufficiency of the evidence based on newly discovered evidence relevant to guilt. *See* discussion in Section III, *infra*. Finally, existing procedures in the state and federal courts, as well as the clemency and commutation powers of the executive branch, adequately assure that an innocent person will not be convicted, sentenced to death, and executed.

A. Constitutional requirements and post-trial review assure the accuracy of conviction and sentence.

Herrera concedes, as he must, that "[a] vast array of due process protections helps to assure that no innocent person is convicted of a crime" (Petition at 34). Indeed, the constitutional protections adhering to capital trials and sentencing already

[18] However, the statutes governing post-conviction remedies of two of those states expressly allow for consideration of newly discovered evidence relevant to guilt. While twenty of the thirty-three states that limit the time in which a motion for new trial may be filed either do not place time limits on a defendant's use of state collateral review or have a statutory "cause exception" to time limits, none of these twenty states expressly includes newly discovered evidence relevant to guilt within the statutory scope of collateral review. *See* Appendix B.

render it virtually impossible to convict a truly innocent person. The integrity of the legal process in a criminal case is protected by rules governing the admissibility of evidence, the requirement that a defendant receive the effective assistance of counsel, the placement of the burden of proof on the prosecutor, the indispensable condition that guilt be found beyond a reasonable doubt, and similar measures. For those instances in which a prosecutor withholds exculpating evidence, post-trial relief is available under the doctrine of *Brady v. Maryland*. 373 U.S. 83 (1963). Because of these protections it is "unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." *Ford v. Wainwright*, 477 U.S. at 420 (Powell, J., concurring).

Moreover, the Texas Rules of Criminal and Appellate Procedure provide a post-trial mechanism by which a convicted person may present newly discovered evidence, including claims of innocence, to the courts. Herrera admits that such procedures exist in Texas, brief at 38, but complains that time limitations are placed upon the period within which an appropriate motion may be filed.

In Texas, a motion for new trial must be filed within thirty days of conviction. Whether this thirty days is designated discretionary or jurisdictional depends on the date of the conviction. Because Herrera was sentenced on January 21, 1982, his case is governed by Article 40.05 of the Texas Code of Criminal Procedure, as amended in 1981.[19] Although the

[19] For a person who was convicted prior to 1981, Article 40.05 of the Texas Code of Criminal Procedure provides that the trial court may entertain an untimely motion for new trial where good cause exists. *In re Whitmore*, 570 S.W.2d 889, 898 (Tex. Crim. App. 1977). September 1, 1986, was the effective date of current Rule 31 of the Texas Rules of Appellate Procedure. *Drew v. State*, 743 S.W.2d 207, 222 n.8 (Tex. Crim. App. 1987). At least one intermediate appellate court has held that, for a person who has been convicted after that date, Rule 2(b) of the Texas Rules of Appellate Procedure affords flexibility with respect to the thirty-day time limitation. *Callis v. State*, 756 S.W.2d 826, 827-828 (Tex. App. -- Houston [1st Dist.] 1988).

Texas Court of Criminal Appeals has on occasion considered the merits of an untimely motion for new trial under Article 40.05, *Drew v. State*, 743 S.W.2d 207, 226-29 (Tex Crim. App. 1987); *see also Anderson v. State*, 717 S.W.2d 622, 626 (Tex. Crim. App. 1986), Texas courts generally have treated the thirty-day time limitation under Article 40.05 as jurisdictional. *Beathard v. State*, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989); *Drew v. State*, 743 S.W.2d at 222-29.

Moreover, the time limitation imposed by Texas' new trial procedure reflects the state's interest in reliable determinations of guilt as well as finality. See discussion in Section III, *infra*. The passage of time facilitates the fabrication of evidence and makes retrials progressively less reliable. "[W]hen a [defendant] succeeds in obtaining a new trial, the '"erosion of memory" and "dispersion of witnesses" that occur with the passage of time,' *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986), prejudice the government and diminish the chance of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. ___, ___, 111 S.Ct. 1454, 1468 (1991).

Finally, the accuracy of conviction and sentence are further assured by state and federal habeas review. State collateral review encompasses claims of fundamental or constitutional error, *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989), but not challenges to the verdict based solely on newly discovered evidence relevant to guilt. *Ex parte Binder*, 660 S.W.2d 103, 104-06 (Tex. Crim. App. 1983).

Similarly, federal habeas review encompasses claims of federal constitutional dimension. While the existence of newly discovered evidence relevant to guilt does not establish a basis for federal habeas review where the evidence is unrelated to a constitutional violation, *Townsend v. Sain*, 372 U.S. at 317 (newly discovered evidence "must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas

corpus"); *accord Stockton v. Commonwealth of Virginia*, 852 F.2d 740, 749 (4th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989); *Ellis v. Collins*, 956 F.2d 76 (5th Cir.), *cert. & stay denied*, ___ U.S. ___, 112 S.Ct. 1285 (1992); *Burks v. Egeler*, 512 F.2d 221, 230 (6th Cir.), *cert. denied*, 423 U.S. 937 (1975); *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 674 (7th Cir.), *cert. denied*, 449 U.S. 880 (1980); *Byrd v. Armontrout*, 880 F.2d 1, 8 (8th Cir. 1989) (claim of newly discovered evidence relevant only to guilt not ground for habeas relief; failure of state to provide procedure for consideration of such evidence violates neither due process nor the Eighth Amendment), *cert denied*, ___ U.S. ___, 110 S.Ct. 1326 (1990); *Drake v. Francis*, 727 F.2d 990 (11th Cir. 1984), *cert. denied*, 478 U.S. 1020 (1986); *United States ex rel. Sliva v. Rundle*, 222 F. Supp. 774 (E.D. Pa. 1963); *but see Grace v. Butterworth*, 586 F.2d 878, 880 (1st Cir. 1978) (federal courts have jurisdiction to review state court denials of motions for new trial); *Sanders v. Sullivan*, 863 F.2d 218, 224-26 (2nd Cir. 1988) (state's failure to cure a conviction founded on credible recantation by important and principal witness exhibits sufficient state action to constitute a due process violation); *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991) (newly discovered evidence bearing on a witness' credibility or directly on the defendant's guilt provides a basis for federal habeas relief if it would produce an acquittal on retrial); *Harris v. Vasquez*, 943 F.2d 930, 957 (9th Cir. 1990) (habeas relief warranted where newly discovered evidence would probably produce an acquittal), actual innocence is considered in evaluating whether a procedural default or abuse of the writ foreclose review of a constitutional claim.

Contrary to Herrera's argument, limiting review to fundamental and constitutional error does not mean that an incorrect assessment of guilt will go uncorrected. It is extremely unlikely that a prisoner could have a valid claim of innocence but be unable to attribute his erroneous conviction to a constitutional violation. As a practical matter, actual innocence can never be newly discovered evidence because a defendant normally would know whether he committed the crime of

which he is accused. The Fifth Amendment privilege against self incrimination does not entitle a defendant to withhold the exculpatory evidence of his own testimony. "Nothing in the Fifth Amendment privilege against self-incrimination entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand and testify." *Williams v. Florida*, 399 U.S. 78, 85 (1970). A defendant is entitled to the assistance of constitutionally effective counsel, whom he presumably informs of his innocence, as well as myriad constitutional protections that assure that he is not disadvantaged in establishing a reasonable doubt as to his guilt. Under these circumstances, it is "reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed." *Taylor v. Illinois*, 484 U.S. 400, 414 (1988).

Because Herrera cannot claim that the evidence he now proffers was entirely unavailable at the time of trial, this case does not present a failure of process but rather reflects an attempt by Herrera to constitutionalize sandbagging by turning the trial into but a preliminary determination of guilt, subject to redetermination ten years after the first. Herrera does not explain his failure to assert his innocence at trial or to subpoena and introduce alibi testimony of family members. It is axiomatic that if, despite the overwhelming evidence to the contrary, Herrera had not committed the offense of which he stands convicted, he would have known of that fact and could have testified to this fact at trial. He also would have known of potential alibi testimony.

B. Executive clemency is the appropriate vehicle to achieve justice where doubt as to guilt cannot result in reversal or new trial under existing legal standards.

Historically, executive clemency has been considered the appropriate vehicle to achieve justice in situations where doubt as to guilt cannot result in reversal or new trial under existing legal standards. *See* Kobil, *The Quality of Mercy Strained, Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 624 (1991) (hereinafter Kobil); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 525-26 (1963) (hereinafter Bator). Today, all 36 states that authorize the death penalty have constitutional or statutory provisions for capital clemency. *See* Appendix B. Thus, it is apparent that executive clemency continues to be society's designated mechanism to prevent an inappropriate imposition of a death sentence. Moreover, in upholding the post-*Furman v. Georgia*, 408 U.S. 238 (1972), capital sentencing schemes of Texas, Florida, and Georgia, the Court noted that statutory or constitutional provisions existing in those states provided for capital clemency. *See Jurek v. Texas*, 428 U.S. 262, 274 (1976) (plurality opinion); *Proffit v. Florida*, 428 U.S. 242, 254 (1976) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (plurality opinion).

In Texas, the governor has the power, upon the recommendation of the majority of the Board of Pardons and Paroles, to grant reprieves, commutations of punishment, and pardons. TEX. CONST. art. IV, § 11; TEX. CRIM. PROC. CODE ANN. art. 48.01 (Vernon Supp. 1992). In capital cases, the board's considerations are triggered by either a request from the majority of trial officials of the convicting court, a written request of the convicted person or his or her representative setting forth all grounds upon which the application is based, or the written request of the governor. Corrections and Public Safety, 37 TEX. ADMIN. CODE §§ 143.57, 143.58 (West Supp. 1992). Moreover, the governor has the power to grant one reprieve in a capital

case for a period not to exceed thirty days without the recommendation of the board. TEX. CONST. art. IV, § 11; TEX. CRIM. PROC. CODE ANN. art. 48.01 (Vernon Supp. 1992).

Herrera's assertion that executive clemency does not effectively foreclose the possible execution of an actually innocent person who has been convicted and sentenced to death reflects the two principal, but unwarranted, criticisms that have been leveled against the effectiveness of the clemency mechanism. First, critics argue that the popularity of the death penalty and the corresponding pressure on politicians to uphold capital convictions account for the post-*Gregg* era drop in the number of commutations. Cobb, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L. J. 389, 893 & n.25 (1989) (hereinafter Cobb); Kobil, *supra*, at 608. Second, they argue that the effectiveness and fairness of executive clemency is undermined because clemency considerations normally are not guided or controlled by specified procedures and, thus, no due process protections adhere, and because the clemency decision is not usually subject to judicial review. These criticisms are flawed.

The decrease in commutations can be more reasonably attributed to the post-*Furman* limiting of the potential imposition of a death sentence from an extensive list of felonies to a narrow group of aggravated murders, and to the provisions for individualized sentencing and heightened reliability in assessment of death sentences, than to the popularity of capital punishment. Indeed, the individualized sentencing mandated in capital cases allows the jury to take into mitigating consideration evidence that used to provide a basis for commutation, such as evidence of reduced culpability or mental defects. The assumption that the decrease in commutations should be attributed to political pressure is unwarranted: it should not be "assume[d] that what is unexplained is invidious." *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

Moreover, it is precisely the fact that clemency considerations are neither encumbered by procedure nor subject to review that renders them the appropriate extraordinary remedy. Clemency long has been recognized as an extraordinary remedy that can be extended for virtually any reason at all. Unconstrained by evidentiary rules and procedure, the executive authority is free to grant clemency both to enhance justice and further goals unrelated to justice. *See* Kobil, *supra*, at 578-79. "It is precisely because society remains uneasy with the judicial process of criminal law enforcement that it has placed outside the courts the power to review and adjust sentences." *A Matter of Life and Death*: *Due Process Protection in Capital Sentencing Proceedings*, 90 YALE L. J. 889, 898 (1981); *see also* Cobb, *supra*, at 391 (the exercise of mercy through clemency requires that death sentences be contemplated "from a perspective external to the norms of due process, in order to satisfy the intuition that judicial norms may not always suffice in fixing a punishment as difficult as death"). Someone like Herrera, whose claim of actual innocence is undermined by the hearsay nature of his evidence, actually would benefit from the non-judicial nature of the clemency considerations and, given the internal inconsistency of his evidence as well as its inconsistency with evidence established at trial, would benefit from the fact that the decision to grant clemency is not subject to review. Executive clemency cannot effectively operate as the extraordinary remedy and yet be subject to the constraints of due process and judicial review.

III.

THE POST-CONVICTION REVIEW SOUGHT BY HERRERA WOULD REQUIRE AN UNWARRANTED EXPANSION OF BOTH SUBSTANTIVE AND PROCEDURAL PROTECTIONS.

Despite the myriad constitutional protections adhering to the trial and the many tiers of potential review available to a

death-sentenced inmate, Herrera seeks a rule that effectively would require the federal courts to try anew the ultimate issue in the state criminal trial--his guilt or innocence of a state offense. The rule cannot be justified. Extending the guilt-innocence inquiry beyond the factfinder's deliberations at trial and beyond the review required by *Jackson*, as proposed by Herrera, is without constitutional authority.

A. Post-trial consideration of guilt based on newly discovered evidence would constitute a constitutionally unwarranted usurpation of the jury's function by a reviewing court.

Post-trial consideration of guilt based on newly discovered evidence would be a constitutionally unwarranted usurpation of the jury's function by the reviewing court. The *Jackson* standard of review was crafted by the Court to be the least intrusive means of insuring the mandate of *Winship*: that an accused is convicted only upon evidence that is sufficient to fairly support a conclusion that every element of the crime has been established beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 314, 319. The *Jackson* Court "emphasized repeatedly the deference owed the trier of fact and, correspondingly, the sharply limited nature of the constitutional sufficiency review." *Wright v. West*, ___ U.S. ___, No. 91-542, slip op. at 18 (June 19, 1992). Thus, the *Jackson* standard impinges upon jury discretion only to the extent necessary to ensure that a properly instructed jury does not convict "when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Id.* at 317.

Herrera now proposes that the constitutional protections be extended from assuring a rational verdict to assuring a verdict based on imaginative use of newly discovered evidence. Not only would this denigrate the jury's deliberative process to but a preliminary determination, it also would require constitutionalizing procedures far beyond the trial process actually required by the Constitution. Defendants have no

constitutional right even to have the constitutionality of their conviction reviewed on direct appeal, *Abney v. United States*, 431 U.S. 651, 656 (1977); *McCane v. Durston*, 153 U.S. 684 (1894), or collateral review. *Murray v. Giarratano*, 492 U.S. at 10. While the Constitution guarantees a defendant a trial by an impartial jury and that he shall not be deprived of life or liberty without due process of law, there simply is no constitutional authority, either direct or derivative, for a process beyond the trial to determine guilt.[20]

B. The scope of federal habeas review should not be extended to post-conviction claims of actual innocence based on newly asserted evidence.

A determination of a state prisoner's "real" or "actual" guilt of a state offense based on a post-trial proffer of newly discovered evidence, independent of any causative constitutional error, is both the most intrusive and the least useful exercise that a federal habeas court could undertake. For this reason, the states must be permitted to make the final and dispositive determination of guilt or innocence.

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. . . . Repose is a psychological necessity in a secure and active society, and it should be one of the aims--though . . . not the sole aim--of a procedural system to

[20] If this Court were to hold that, upon a certain threshold showing of newly discovered evidence, a death-sentenced inmate is entitled to a procedure by which he can obtain a new trial and if the state failed to provide such a procedure, the review of the constitutional deprivation that would evolve upon a federal habeas court would be tantamount to directly considering guilt.

> devise doctrines which, in the end, do give us repose, do embody the judgment that we have tried hard enough and thus may take it that justice has been done. There comes a point where a procedural system which leaves matters perpetually open no longer reflects a humane concern but merely anxiety and a desire for immobility.

Bator, *supra* at 452-53; *see also Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (separate opinion of Harlan, J.). Under the federal system established by the Constitution, the point of federal "repose" in reviewing state convictions must come with the conclusion that the trier of fact acted rationally and that no federal constitutional violation probably caused the conviction of one who is actually innocent of the state crime. At this point, the federal interest in the state guilt-innocence determination ends, and so also should "final competence to determine legality." Bator, *supra*, at 451. To acknowledge that there is a limit on federal authority to intrude into the state criminal process is merely to recognize an inherent aspect of federalism.

> [I]t must be remembered that direct appeal is the primary avenue for review of a conviction or sentence and death penalty cases are no exception. When the process of direct review--which, if a federal question is involved includes the right to petition this Court for writ of certiorari--comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

The Constitution's allocation of power between the states and the federal government is founded on the proposition that the states are competent to make--*i.e.*, can be trusted by the federal government to make--the final determination of this core question. "The states possess *primary authority* for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (emphasis added). As the Court more recently iterated:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. (citation omitted).

Schad v. Arizona, 501 U.S. at ___, 111 S.Ct. at 2500, *quoting Patterson v. New York*, 432 U.S. at 201. Not only is the criminal law an aspect of the police power[21] primarily vested in the states, but it also is a fundamental attribute of the sovereignty reserved to the states under the Constitution. The question whether an individual is guilty or innocent of a state offense is not just *a* state law question, which is outside the ambit of federal jurisdiction, but is *the* ultimate state law question at the criminal trial.

Herrera's proposed rule, thus, would constitute more than a "mere" intrusion into the state criminal process, which itself counsels the exercise of restraint and care on federal habeas review of state convictions. *Engle v. Isaac*, 456 U.S. at 128 & n.33. Rather it would amount to a usurpation of a fundamental and traditional aspect of state sovereignty,

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[21] "Public safety, public health, morality, peace and quiet, law and order--these are some of the more conspicuous examples of the traditional application of the police power. . . ." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

substantially impinging on a "'function[] essential to separate and independent existence'" of the state criminal justice system. *See Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911), *quoting Lane County v. Oregon*, 7 Wall. 71, 76 (1869). If the final and dispositive determination of the issue of an individual's guilt of a state offense is to be made by a federal habeas court, despite the fact that the trial comported with constitutional requirements, there is no point in conducting the state trial in the first instance. The entirety of the state criminal process, representing a substantial investment of resources, would be relegated to the level of a probable cause hearing.

A rule permitting the federal courts to redetermine guilt or innocence cannot be justified on the basis that the state trial is not suited to its most basic task of reliably determining guilt or innocence or that trial processes conforming to constitutional mandates are somehow inferior to those that would be used by a federal habeas court to redetermine the issue years after the crime was committed. Society appropriately has designated the criminal trial as the proceeding in which a defendant's guilt or innocence is finally and dispositively determined. This Court has recognized that the criminal trial is and should be a "decisive and portentous event" precisely because it is "the time and place set for [the defendant] to be tried by a jury of his peers and found either guilty or not guilty." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). Substantial societal resources--economic, political, moral, and judicial--have been marshalled at this one point in the criminal process to ensure that the outcome is as accurate as humanly possible. As discussed above, the Constitution itself recognizes the importance and preeminence of the trial and, accordingly, has invested the trial with numerous procedural protections designed to enhance the reliability of the outcome.

In contrast, a belated guilt-innocence determination that is made on collateral review based on newly discovered evidence is, if anything, *less* likely to ensure accuracy and reliability. As this Court has recognized, "the '"erosion of

memory" and "dispersion of witnesses" that occur with the passage of time' . . . prejudice the government and *diminish* the chances of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. at ___, 111 S.Ct. at 1468, *quoting Kuhlmann v. Wilson*, 477 U.S. at 473 (plurality opinion) (emphasis added). Further, any so-called new evidence bearing on the question of guilt or innocence is inherently untrustworthy.

> We presume that evidence that is not discovered until after the trial is over would not have affected the outcome. It is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed.

Taylor v. Illinois, 484 U.S. at 414 (footnote omitted). Finally, the idea that a single federal judge is best situated to reliably adjudicate guilt is contrary to the most basic assumptions underlying the Sixth Amendment guarantee of a trial by jury: that the jury is a reliable factfinder and that the "commonsense judgment of a group of laymen" is a better protection against government oppression and arbitrary law enforcement than is reliance on judicial fiat. *Williams v. Florida*, 399 U.S. at 100.

Similarly, direct federal habeas consideration of guilt or innocence cannot be justified on the basis that the states lack an interest in the factual accuracy of the outcome of state criminal trials. Assuming the constitutionality of the process by which an individual is found guilty of a validly defined offense, as does the question presented for review, the state's interest in the integrity of its own process and in the ultimate accuracy of the determination of guilt is greater than any federal interest. As one commentator has noted:

> States have a strong interest in the accurate determination of guilt. Public outrage over an erroneous outcome, the cost of supporting a prisoner who is unjustly incarcerated, and the danger to society presented by erroneously released prisoners provides states with strong incentives to insure proper guilt determinations.

Reed, *Guilt, Innocence, and Federalism in Habeas Corpus*, 65 CORNELL L. REV. 1123, 1142-43 (1980). These incentives, which are heightened in capital cases, uniquely bear on the sovereign that is enforcing the criminal law. After all, it is the state that, within constitutional constraints, has determined that certain conduct so violates its peace and dignity that it must carry criminal sanctions. It is the state that has an interest in enforcing the substantive state criminal laws in a manner that produces convictions of the guilty and acquittals of the innocent.

Herrera, thus, merely quarrels with some of the most fundamental premises upon which the federal system and the American criminal justice system are based. Herrera's proposed rule has a certain emotional appeal because of the natural human desire for certainty, and perhaps even immobility, in cases involving the death penalty. It would attain intellectual appeal, however, only if there were in fact some entity, somewhere, that was infallible in an absolute sense, such that no one could possibly question the propriety of trusting it to make the ultimate and correct decision. That entity does not exist and will not exist until human beings either become omniscient or are removed entirely from the factfinding process. "A court cannot more than any other human agency break down the barrier between appearance and reality." Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 966 (1957). As Justice Jackson stated about this Court: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953).

With respect to the ultimate issue at the state trial, the question of an individual's guilt or innocence of a state offense, the Court already has struck the appropriate balance between federal and state interests and the requirements of federalism.

The federal courts can assure the rationality of the trial outcome by reviewing the sufficiency of the evidence. *Jackson v. Virginia*, 443 U.S. at 319. In addition, the Court will consider whether an alleged constitutional violation probably caused the conviction of someone who is actually innocent. *Murray v. Carrier*, 477 U.S. at 478, 496 (1986); *see also Sawyer v. Whitley*, ___ U.S. ___, No. 91-6382, slip op. at 14 (June 22, 1992). Where the conviction of an innocent person can be traced to constitutional error during the trial, both the ultimate federal responsibility for vindicating constitutional rights and the state action that violated the defendant's constitutional rights serve to justify the limited federal consideration of the question of guilt. Where there is no underlying constitutional violation, these justifications vanish, and so also should the federal authority to intrude into the state's administration of criminal justice.

IV.

IN ANY EVENT, A PETITIONER SHOULD BE REQUIRED TO SATISFY A HIGH THRESHOLD SHOWING BEFORE NEWLY DISCOVERED EVIDENCE RELEVANT TO GUILT IS CONSIDERED IN POST-TRIAL REVIEW.

If, despite the considerable interests militating against such consideration, the Court determines that the Eighth Amendment requirement of heightened reliability and the finality of a death sentence require consideration of claims based solely on newly discovered evidence relevant to guilt, review must be cast in terms of a constitutional violation that does not require the federal habeas court to directly adjudicate guilt or innocence. For example, direct federal adjudication of guilt or innocence of a state offense would not be required if it were determined that, upon a requisite threshold showing, a death-sentenced inmate were constitutionally entitled to a procedure by which he could obtain a new trial, such as an untimely motion for new trial.

Moreover, if a constitutional standard is formulated for consideration of newly discovered evidence relevant to guilt, the standard must be a rigorous one. Sound considerations militate in favor of limiting the constitutional protection to those petitioners who can show by clear and convincing evidence that the newly discovered evidence of actual innocence (1) was unavailable at the time of trial and at the time of all prior writs, (2) would be admissible upon retrial, and (3) is such that upon retrial no reasonable juror could find him guilty of the capital offense. This standard incorporates the unavailability and admissibility requirements of existing state and federal standards for motions for new trial.

In addition, considerations similar to the ones underlying the actual innocence standard delineated in *Sawyer v. Whitley*, ___ U.S. at ___, No 91-6382, slip op. at 14, favor imposing the burden of establishing by clear and convincing evidence that no reasonable juror could find the petitioner guilty of the offense. First, this standard assures that a defendant who has presented evidence of actual innocence at trial is not placed in a less advantageous position upon review than one who after trial claims to have just discovered evidence of his innocence. Second, it makes it less likely that a defendant, whose evidence of innocence and own credibility are suspect, will use the trial as an initial forum for testing the strength of the state's case before presenting existing evidence in a post-trial forum. Third, unhinged from the requirement of identifying a constitutional violation in the trial, a lesser burden likely would give rise to an unlimited variety of claims of innocence asserted at the last moment in an attempt to foreclose the imposition of a death sentence.

By formulating any constitutional entitlement as the right to a state procedure by which a death-sentenced inmate can seek a new trial upon meeting the requisite threshold standard for actual, as opposed to legal, innocence, the Court would properly limit those instances in which it is incumbent upon the federal habeas court to conduct such review to situa-

tions where the state fails to provide such a procedure. Unlike the review required by *Jackson v. Virginia*, which reflected an existing and fundamental right to be convicted only upon evidence sufficient to rationally support a conclusion that every element of the crime has been established beyond a reasonable doubt, the proposed review does not emanate from either a protection afforded by the Bill of Rights or one that has been determined to be essential to fundamental fairness. Thus, the Court's disinclination in *Jackson v. Virginia* to apply a *Stone v. Powell*, 428 U.S. 465 (1976), type limitation to federal habeas review should not be controlling here where the procedure is designed only to insure against the extraordinary possibility that a sentence of death will be imposed on one who is actually innocent.

Herrera's proposed standard, whether an inmate could show "a fair probability that in light of all the evidence -- including the evidence that is newly discovered -- the trier of fact would have entertained a reasonable doubt of his guilt" (brief at 44), would create a lower standard for claims of actual innocence than for claims of newly discovered evidence that are presented in a timely manner to the federal or state trial courts. It would inappropriately transform state trials into but a preliminary proceeding and provide no disincentive to sandbagging.

V.

A REQUIREMENT THAT STATES PROVIDE POST-TRIAL PROCEDURES FOR CONSIDERATION OF NEWLY DISCOVERED EVIDENCE WOULD BE A NEW CONSTITUTIONAL RULE BARRED UNDER *TEAGUE V. LANE*.

Finally, acceptance of Herrera's argument would require the Court to announce and apply retroactively a new rule of constitutional law. As discussed above at section I, no law in existence at the time Herrera's conviction became final arguably supports, much less dictates, the rule he seeks. Consequently,

review and relief in this collateral proceeding are foreclosed by *Teague v. Lane*, 489 U.S. 288 (1989); *Butler v. McKellar*, 494 U.S. 407, 412-15 (1990).

The rule Herrera seeks would not come within the first *Teague* exception, which is reserved for rules that place certain primary conduct beyond the government's power to proscribe or a class of persons beyond its power to punish. *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989). These are "substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed." *Id.* By definition, every state prisoner comes to federal habeas court as one who is guilty, and where his trial was conducted in accord with constitutional requirements, the state's power to punish has been established by proof beyond a reasonable doubt. *See Ford v. Wainwright*, 477 U.S. at 429 (O'Connor, J., joined by White, J., concurring in part and dissenting in part) ("I consider it self-evident that once society has validly convicted an individual and therefore established its right to punish, the demands of due process are reduced accordingly").

Similarly, to the extent Herrera seeks a post-conviction procedure for relitigating the issue of guilt-innocence, despite the fact that the state trial provided him with a manifestly full, fair, and adequate opportunity for *timely* litigation of that issue, he may not benefit from application of the new rule. The second *Teague* exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague v. Lane*, 489 U.S. at 313; *see also Butler v. McKellar*, 494 U.S. at 416. Because Herrera's proposed rule itself presumes that no constitutional violation at trial produced the conviction of an innocent person, and because he seeks only post-conviction procedures, the rule is incapable of enhancing the accuracy and reliability of the trial outcome. Rather, the rule merely would encourage sandbagging at trial or relitigation of guilt or innocence in federal court, years after the crime was committed, based on stale and otherwise unreliable evidence.

As discussed *supra* at sections II and III, existing constitutional protections that apply at trial are adequate to assure the reliability of the trial outcome. In contrast, a redetermination of guilt or innocence on habeas review is likely to inject arbitrariness and unreliability into the determination; if only because of the passage of time, the redetermination is much more likely to be factually inaccurate than was the outcome of the trial. The incremental increase in protection, if there be any, simply would not constitute a bedrock rule. *Sawyer v. Smith*, 497 U.S. ___, ___, 110 S.Ct. 2822, 2832 (1990).

VI.

BECAUSE HERRERA'S NEWLY PRESENTED EVIDENCE IS SELF-CONTRADICTORY AND INCREDIBLE, IT CANNOT PROVIDE A BASIS FOR RELIEF.

There is no possibility in Herrera's case that an innocent man has been convicted for a crime that he did not commit. The evidence of his guilt, which the jury credited, is overwhelming. Herrera's newly presented evidence, to the contrary, is self-contradictory and unpersuasive, and could not have led to any different outcome to his trial. Thus, under the least stringent standard that could be imposed, there is no possibility that he would be entitled to relief.

A. Evidence of Herrera's guilt is overwhelming.

The affidavits upon which Herrera premises his claim of innocence do not demonstrate that someone other than Herrera committed the capital murder. Both Carrisalez and the eyewitness to his murder, Enrique Hernandez, identified Herrera as the perpetrator of the capital murder, and their identifications of him, which were unequivocal, were found by every court that has considered the issue to be reliable. Hernandez saw Carrisalez' murderer outside of his car, with the headlights of the patrol car on him, for approximately fourteen

seconds from a distance of fifteen to sixteen feet, long enough to observe and remember the expression on the man's face, and he was certain that Leonel Herrera is the person who shot Carrisalez. Further, Hernandez, a trained observer, saw the car of the murderer when it first was clocked for speeding, when it paused for thirty or more seconds at the intersection, and when it stopped just before Officer Carrisalez was shot with headlights from the patrol car illuminating both the driver's side and the interior of the car. At none of those points did Hernandez ever see anyone other than Leonel Herrera in the car.[22] The nephew's affidavit, which is totally inconsistent with the testimony of the eyewitness to the offense, is simply incredible.

Herrera's newly presented evidence also does not negate his own previous actions. Herrera's written admission to both of the interrelated murders, which was produced wholly independent of any state action, was found in his hip pocket at the time of his arrest. Herrera does not challenge the authenticity of this spontaneous admission; in fact, he relied on it in his state and federal habeas petitions in an attempt to establish his claim with respect to the existence of mitigating evidence. In addition, Herrera entered a plea of guilty to the murder of Trooper Rucker. Herrera's current claim of factual innocence does not explain why, if he were innocent, he would have written the inculpatory letter or pled guilty to the murder of Trooper Rucker.

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[22] Raul Herrera, Jr., claims that he hid on the floor of the car, but the context of the affidavit makes clear that, according to his version of events, he did so only *after* his father allegedly fired the shots at the officer. Thus, the nephew's affidavit does not explain why only one person was seen in the car at the time it was clocked for speeding, at the time it paused at the red light, and at the time it was actually stopped. It also does not suggest that Chavello Lopez, the third person who allegedly was in the car with the nephew and his father, *ever* ducked down out of sight. Consequently, even if Raul Herrera, Jr., had gone down on the floorboard, as he now says he did, Hernandez still would have seen at least one other person in the car.

Further, Herrera's newly presented evidence does not explain the physical evidence that tied him to the murder of Trooper Rucker. It does not explain how, if his brother had commited the crime, his own Social Security card would have been found within seven feet of trooper Rucker's body ten or fifteen minutes before any law enforcement officers arrived on the scene. Even if Herrera normally kept his Social Security card in the glove compartment of the car, as Villareal now claims Raul, Sr., informed him eight years ago, the newly presented evidence does not explain how the card came to be found beside the body, while other personal papers belonging to Herrera remained in the glove compartment undisturbed. It is, of course, not unusual to keep one's Social Security Card in one's wallet. The presence of Herrera's card on the scene of Rucker's murder is entirely consistent with the drop of Type A blood, consistent with that of Trooper Rucker and inconsistent with Herrera's blood type, that had dropped onto Herrera's wallet. Even Herrera cannot contend that Raul, Sr., was in possession of the wallet. There was similar blood, which Herrera also has not attempted to explain, on blue jeans that belonged to him. Moreover, the keys to his car, which indisputably was the one used by the person who murdered Officer Carrisalez and Trooper Rucker, were in the pocket of those jeans. The blood inside Herrera's wallet, the blood on his jeans, his possession of the keys to the vehicle, and the presence of his Social Security card beside Trooper Rucker's body, all are totally inconsistent with Herrera's innocence. His current affidavits do nothing to negate this extremely damning evidence.

B. Herrera's newly discovered evidence is incredible.

While the record is replete with compelling evidence of Herrera's guilt of the capital murder of which he was convicted, there is no competent evidence before this Court to demonstrate that Raul Herrera, Sr., or anyone other than Leonel Herrera committed the capital murder of Officer Carrisalez. Herrera's current claim of innocence relies upon affidavits that are wholly

inconsistent with the testimony that was presented at Herrera's trial, the physical evidence in the case, and Herrera's own admissions. Finally, and perhaps of greatest significance, the only two of Herrera's affidavits that provide any details are so inconsistent with each other that they cannot be given credence.

As noted in the Statement of the Case, *supra*, at 14-15, the affidavits upon which Herrera bases his claim of innocence contradict each other with respect to the number and identity of the people in the car with Raul Herrera, Sr., at the time he allegedly murdered the two law enforcement officers. They also are totally inconsistent with each other in the manner in which they describe the sequence of events, and even with respect to the direction in which Raul Herrera was allegedly traveling at the time. Further, the affidavits are in conflict with affidavits from family members who were in a position to provide an alibi for Herrera, but who failed to do so even though they previously had proffered affidavits in support of Herrera's federal habeas claims.

Because the assertions upon which Herrera now relies come from family members and close friends, there is no apparent explanation for his wait of ten years before claiming "innocence" and an alibi defense. Raul, Jr.'s, affidavit indicates that Raul, Sr., used Herrera's car to commit the murders. If Herrera's relatives had access to this car, as the nephew now indicates, it is inconceivable that, once Herrera was arrested for the murders of Rucker and Carrisalez, he did not question his relatives about these circumstances or tell his trial attorney (who is now deceased) about this crucial piece of potentially exculpatory information. Even if Herrera had been unwilling to point the finger at the person who allegedly had used his car to commit the offense, the affidavits on which he now relies would suggest that he was asleep in his sister's house on the night of the offense and therefore had an alibi defense. He failed to develop any such defense at trial, or to mention it in any fashion in any court for more than ten years after he was convicted. Herrera's failure to develop this evidence in a timely fashion,

when it could properly be evaluated by a jury, casts doubt on its authenticity now.[23] Much more compelling evidence should be required for an eleventh-hour claim to justify a stay of execution, much less habeas corpus relief.

CONCLUSION

For the above reasons, the Director requests that the judgment of the court below be affirmed.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

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[23] The record demonstrates that, at each point in the process, as Herrera has seen the flaws in his current pleading, he has added new allegations and tried to mold his arguments so that he will be granted relief. When Herrera initially raised his claim of actual innocence in the state court, he relied on hearsay affidavits. When the courts properly found those affidavits to be incompetent evidence, he filed an affidavit in federal habeas court in which Raul Herrera, Jr., made assertions in an attempt to establish the factual innocence of Leonel Herrera. When it became clear that the courts would not provide relief on the basis of a claim of factual innocence, Herrera recast his claim in an attempt to fit it within the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). His first mention of the allegation that police officers had threatened family members during Herrera's trial was made -- without evidentiary support -- on February 18, 1992, the eve of his execution, in a footnote to his motion pursuant to Rule 59(e) to amend the district court's original order on his second federal habeas petition. Only after it became clear that the courts would not accept a conclusory and unsubstantiated *Brady* claim did Herrera produce a second affidavit of Raul Herrera, Jr., in which he suggests -- for the first time -- that law enforcement officers visited his home during Leonel Herrera's trial and threatened his family that they should not expose drug dealing by law enforcement agencies. This affidavit was executed on February 17, 1992, and therefore was available at the time Herrera filed his Rule 59(e) motion with the federal district court, but Herrera did not present it. Only after the Fifth Circuit vacated the district court's stay of execution and denied habeas relief did Herrera produce this affidavit. The gamesmanship Herrera has exhibited in raising his claim of "innocence" ten years after his trial casts doubt on the veracity of his evidence.

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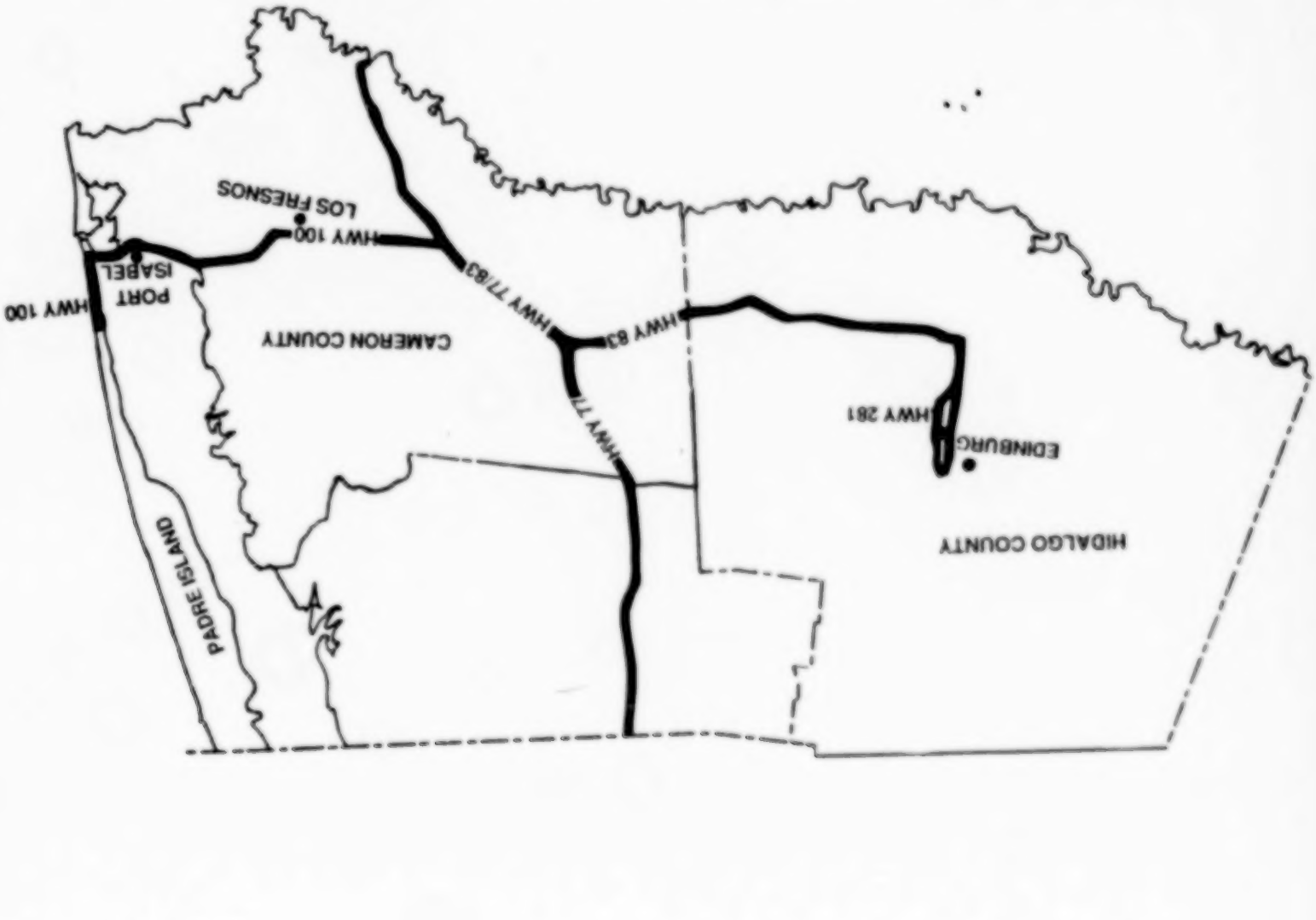
APPENDIX A


LOS FRESNOS
HWY 100
PORT ISABEL
HWY 100
CAMERON COUNTY
HWY 77/83
HWY 83
HWY 77
HWY 281
EDINBURG
HIDALGO COUNTY
PADRE ISLAND

APPENDIX B

SURVEY OF PROCEDURES TO CONSIDER NEWLY DISCOVERED EVIDENCE AND EXECUTIVE CLEMENCY[1]

[1] The information in this appendix cannot be considered exhaustive but is as thorough as possible in light of the time constraints under which it has been prepared. For the sake of brevity, portions of some statutory provisions have been summarized rather than quoted directly.

FEDERAL SYSTEM

Motion for New Trial

Fed. R. Crim. P. 33 - A motion for new trial based on newly discovered evidence must be presented within 2 years of final judgment. A motion for new trial based on other grounds shall be made within 7 days after verdict or finding of guilty.

Post-Conviction Remedies

28 U.S.C. § 2255 - Motion may be made at any time.

Procedures for Pardon, Commutation, or Clemency

Constitution of the United States, Art. II §2

ALABAMA

Motion for New Trial

Ala. R. Crim. P. 24.1 - Must be filed no later than thirty days after sentence is pronounced.

Post-Conviction Remedies

Ala. R. Crim. P. 32.1(e) - A defendant may institute a proceeding in the court of original conviction to secure appropriate relief on the ground, *inter alia*, that newly discovered material facts exist which require that the conviction or sentence be vacated by the court because:

(1) The facts relied upon were not known by petitioner or petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;

(2) The facts are not merely cumulative to other facts that were known;

(3) The facts do not merely amount to impeachment evidence;

(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and

(5) The facts establish that petitioner is innocent of the crime for which petitioner was convicted or should not have received the sentence that petitioner received.

Ala. R. Crim. P. 32.2(c) - The court shall not entertain a petition based on the grounds specified in Rule 32.1(e) unless the petition is filed within the applicable two-year period specified in the first sentence of this section, or within six months after the discovery of the newly discovered material facts, whichever is later.

Procedures for Pardon, Commutation, or Clemency

Constitution of Alabama, Art. V, § 124

ALASKA

Motion for New Trial

Alaska R. Crim. P. 33 - A motion for a new trial based on newly discovered evidence may be made only before or within two years after final judgment; if an appeal is pending the court may grant the motion only on remand of the case.

Post-Conviction Remedies

Alaska R. Crim. P. 35.1(a)(4) - Relief is available upon a claim that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

Standard for Newly Discovered Evidence

A motion for a new trial based on newly discovered evidence must meet the following requirements: (1) it must appear from the motion that the evidence relied on is, in fact, newly discovered, *i.e.*, discovered after the trial; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) the evidence must be material to the issues involved; and (5) the evidence must be such as, on a new trial, would probably produce an acquittal. *Rank v. State*, 382 P.2d 760, 761 (Alaska 1963).

Procedures for Pardon, Commutation, or Clemency

Constitution of Alaska, Art. III, § 21

ARIZONA

Motion for New Trial

Ariz. R. Crim. P. 24.2(a)(2) - Upon motion made no later than 60 days after the entry of judgment and sentence but before the defendant's appeal, if any, is perfected, the court may vacate the judgment on the ground, *inter alia,* that newly discovered material facts exist, under the standards of Rule 32.1.

Post-Conviction Remedies

ARIZ. REV. STAT. ANN. § 13-4231 *et seq.* (1989) - Contains no time limitation.

ARIZ. REV. STAT. ANN. § 13-4231(5) - Grounds for relief include the existence of newly discovered evidence. The court is to consider whether the new facts, if introduced, would have changed the verdict or sentence; whether the petitioner exercised diligence to discover and produce the evidence at

trial; and whether the petitioner commenced a proceeding promptly after discovery of these facts.

Ariz. R. Crim. P. 32.1(e) - Any person who has been convicted of, or sentenced for, a criminal offense may institute a proceeding to secure appropriate relief on the ground, *inter alia,* that newly-discovered material facts exist which may require that the conviction or sentence be vacated. The court is to consider:

(1) The probability that such facts, if introduced would have changed the verdict, finding or sentence;

(2) The diligence which would have been required to discover and produce the evidence at trial;

(3) The promptness with which the petitioner has commenced a proceeding after discovery of such facts.

Procedures for Pardon, Commutation, or Clemency

Constitution of Arizona, Art. 5, § 5

ARKANSAS

Motion for New Trial

Ark. R. Crim. P. 36.22 - A convicted person may file a motion for new trial, but all motions must be filed prior to the time fixed to file a notice of appeal.

ARK. CODE ANN. §16-89-130 (Michie 1987) -

(b) The application for a new trial must be made at the same term at which the verdict is rendered, unless the judgment is postponed to another term, in which case it may be made at any time before judgment.

(c)(6) The court in which a trial is had upon an issue of fact may grant a new trial when a verdict is rendered against the convicted person by which his substantial rights have been prejudiced, upon the ground, *inter alia,* that the convicted

person has discovered important evidence in his favor since the verdict.

ARK. CODE ANN. §16-91-105 -

(a)(1) A notice of appeal must be filed within 30 days from the date of the sentence and entry of judgment.

(b)(1) Prior to the time fixed to file a notice of appeal, a convicted person may file a motion for new trial or any other application for relief.

(b)(5) Upon the filing of any motion or other application for relief in the trial court, the time to file a notice of appeal shall not expire until 30 days after the disposition of all motions or applications.

Post-Conviction Remedies

R. Crim. Pro. 37.2(c) - A petition must be filed within 60 days from the date mandate issued by the appellate court or within 90 days from entry of judgment if the conviction was obtained upon a plea of guilty.

Standard for Newly Discovered Evidence

R. 37.2 requires a convicted person to bring any claim for collateral review of his conviction "within [60 days] of the date of commitment, unless the ground for relief would render the judgment of conviction absolutely void." *Henderson v. Sargeant,* 926 F.2d 706, 709 (8th Cir. 1991).

Procedures for Pardon, Commutation, or Clemency

Constitution of Arkansas, Art. V §11

CALIFORNIA

Motion for New Trial

CAL. PENAL CODE §1181(8) (West 1982) - When a verdict has been rendered against the convicted person, the court may, upon his application, grant a new trial, *inter alia,* when new evidence is discovered material to the convicted person, which he could not, with reasonable diligence, have discovered and produced at trial.

Post-Conviction Remedies

CAL. PENAL CODE §1473(d)

Standard for Newly Discovered Evidence

In order to warrant habeas corpus relief, new evidence must be such as to undermine the entire structure of the case upon which the prosecution was based; it must point unerringly to the petitioner's innocence and must be conclusive; it is not sufficient that the new evidence conflicts with that presented at the trial and would have presented a more difficult question for the trier of fact. *In Re Pratt,* 112 Cal. App. 3d 795, 796 (1980).

Procedures for Pardon, Commutation, or Clemency

Constitution of California, Art. V, § 8

COLORADO

Motion for New Trial

Colo. R. Crim. P. 33(c) - A motion for a new trial based upon newly discovered evidence shall be filed as soon after entry of judgment as the facts supporting it become known to the

convicted person; if a review is pending the court may grant the motion only on remand of the case.

Post-Conviction Remedies

COLO. REV. STAT. ANN. §16-5-402(1) (West 1990) - No time limitation is placed upon the period within which a person may collaterally attack his conviction for a class one felony.

R. Crim. P. 35(c)(2)(V) - Relief may be granted if there exists evidence of material facts, not heretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned by the convicted person or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice.

R. Crim. P. 35(c)(3) - The motion may be filed at any time.

COLO. REV. STAT. ANN. § 18-1-410(1)(e) - Notwithstanding the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make applications for post-conviction review. To justify a hearing, an application for post-conviction review must, in good faith, allege, *inter alia,* that there exists evidence of material facts, not heretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned of by the convicted person or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice.

Standard for Newly Discovered Evidence

For a motion for new trial based on newly discovered evidence to succeed, the moving party must establish: (1) that the evidence was discovered after the trial, and defendant and his

counsel exercised diligence to discover all evidence favorable to defendant prior to and during the trial; (2) that the evidence is material to the issues involved and is not merely cumulative or impeaching; and (3) that on retrial the newly discovered evidence would probably produce an acquittal. *People v. Jones,* 690 P.2d 866, 869 (Colo. Ct. App. 1984).

Procedures for Pardon, Commutation, or Clemency

Constitution of Colorado, Article 4, § 7

CONNECTICUT

Motion for New Trial

CONN. GEN. STAT. ANN. § 52-270(a) (West 1991) - The superior court may grant a new trial of any action that may come before it, for the discovery of new evidence according to the usual rules in such cases.

CONN. GEN. STAT. ANN. § 52-582 - No petition for a new trial in any civil or criminal proceeding shall be brought more than three years after the rendition of the judgment or decree.

Post-Conviction Remedies

CONN. GEN. STAT. ANN. § 52-466 (West 1991) - Contains no time limitation.

Procedures for Pardon, Commutation, or Clemency

Constitution of Connecticut, Art. 4, § 13

DELAWARE

Motion for New Trial

Del. Superior Court Crim. R. 33 - A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment; if an appeal is pending, the court may grant the motion only on remand of the case.

Post-Conviction Remedies

Del. Superior Court Crim. R. 61 -

(i)(1) A motion for post-conviction relief may not be filed more than three years after the judgment of conviction is final.

(i)(5) The time limitation shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

Common Law Writ of Coram Nobis is also available.

Standard for Newly Discovered Evidence.

Before granting a new trial based on newly discovered evidence, the evidence must meet the following three criteria: (1) the new evidence must be of such a nature that it would have probably changed the result if presented to the jury; (2) the evidence must have been newly discovered since trial, and the circumstances must be such as to indicate that it could not have been discovered before trial with due diligence; and (3) the evidence must not be merely cumulative or impeaching. *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987); *State v. Hamilton*, 406 A.2d 879, 880 (Del. Super. Ct. 1974).

Procedures for Pardon, Commutation, or Clemency

Constitution of Delaware, Article VII, § 1

FLORIDA

Motion for New Trial

Fla. R. Crim. P. 3.590(a) - A motion for new trial may be made within ten days after the rendition of the verdict or the finding of the court.

Fla. R. Crim P. 3.600(a)(3) - The court shall grant a new trial on the ground, *inter alia*, that there exists new and material evidence which, if introduced at the trial, would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at trial.

Post-Conviction Remedies

Fla. R. Crim. P. 3.850, Para. 2(1) - A motion to vacate a sentence which exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence become final unless it alleges, *inter alia*, that the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence.

Standard for Newly Discovered Evidence

To warrant granting of a new trial based on newly discovered evidence, it must appear that the new evidence was discovered after the former trial, that due diligence was exercised to obtain and present it at the former trial, and that it is material to the issue. It must go to the merits of the case, must not be cumulative, and must be such as would produce a different verdict.

O'Bryan v. State, 300 So.2d 323, 324-25 (Fla. Dist. Ct. App. 1974).

Procedures for Pardon, Commutation, or Clemency

Constitution of Florida, Art. 4, § 8

GEORGIA

Motion for New Trial

GA. CODE ANN. § 5-5-23 (1990) - A new trial may be granted in any case where any material evidence is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial.

GA. CODE ANN. § 5-5-40 -

(a) All motions for new trial, except in extraordinary cases, shall be made within 30 days of the entry of the judgment on the verdict or entry of the judgment where the case was tried without a jury.

(f) Motions for new trial in cases in which the death penalty is imposed shall be given priority.

GA. CODE ANN. § 5-5-41 -

(a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court.

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled, or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

Standard for Newly Discovered Evidence

The requirements for granting an extraordinary motion for new trial based on newly discovered evidence, incumbent on the movant to prove, include: (1) that the newly discovered evidence has come to his knowledge since the trial; (2) that want of due diligence was not the reason that the evidence was not acquired sooner; (3) that the evidence was so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence is accounted for; and (6) that the new evidence does not operate solely to impeach the credit of a witness. *Dick v. State*, 287 S.E.2d 11, 13-14 (Ga. 1982).

Procedures for Pardon, Commutation, or Clemency

Constitution of Georgia, Art. IV, § II, Para. II

HAWAII

Motion for New Trial

HAW. REV. STAT. § 635-56 (1985) - The court may grant a new trial for any legal cause.

HAW. R. PENAL P. 33 -

The court may grant a new trial if required in the interest of justice. A motion for new trial shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period.

Haw. R. Crim. P. 59 -

(a) A new trial may be granted to all or any of the parties and on all or part of the issues: (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for

any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the State.

(b) A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

Haw. R. Crim. P. 60(b)(2) - On motion and upon such terms as are just, the court may relieve a party from a final judgment where, *inter alia*, there exists newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

Standard for Newly Discovered Evidence

A motion for new trial based on newly discovered evidence will only be granted if: (1) the evidence has been discovered after trial; (2) such evidence could not have been discovered before or at trial through the exercise of due diligence; (3) the evidence is material to the issues and not cumulative or offered solely for purposes of impeachment; and (4) the evidence is of such nature as would probably change the result of a later trial. *State v. Caraballo*, 62 Haw. 309, 615 P.2d 91 (1980).

Procedures for Pardon, Commutation, or Clemency

Constitution of Hawaii, Article V, § 5, Para. 2

IDAHO

Motion for New Trial

IDAHO CODE § 19-2406(7) (1987) - The court may grant a new trial, *inter alia*, when new evidence is discovered material to the defendant which he could not with reasonable diligence have discovered and produced at trial.

IDAHO CODE § 19-2407 (1991) - The application for a new trial may be made before or after judgment; it must be made within fourteen days after verdict, unless the court or judge extends the time.

Post-Conviction Remedies

IDAHO CODE § 19-4901(a)(4) (1987) - Grounds for relief include that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

IDAHO CODE § 19-4902 - Application is to be filed within five years from the expiration of the time for appeal or the determination of an appeal or from the determination of a proceeding following an appeal.

IDAHO CODE § 19-2719(3) - In a capital case, the defendant must file any legal or factual challenge to the sentence or conviction that is known or reasonably should be known within forty-two days of the filing of the judgment imposing the punishment of death, and before the death warrant is filed.

Standard for Newly Discovered Evidence

A motion for a new trial based on newly discovered evidence must disclose: (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. *Cunningham v. Idaho*, 788 P.2d 243, 244 (Idaho Ct. App. 1990).

Procedures for Pardon, Commutation, or Clemency

Constitution of Idaho, Art. 4, § 7

ILLINOIS

Motion for New Trial

ILL. ANN. STAT. ch. 38, para. 116-1(b) (Smith-Hurd 1983) - A written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict.

Post-Conviction Remedies

ILL. ANN. STAT. ch. 38, para. 122-1 *et seq.* - Contains no explicit provision for newly discovered evidence.

ILL. ANN. STAT. ch. 38, para. 122-1 - No proceedings shall be commenced more than 3 years after rendition of final judgment, unless petitioner alleges facts showing that the delay was not due to his culpable negligence. (The 3-year period is effective Jan. 1, 1992; the prior statute provided for 10 years.)

ILL. ANN. STAT. ch. 110, para. 2-1401 -

(a) Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished.

(c) The petition for relief from judgment must be filed not later than 2 years after the entry of the order or judgment.

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.

Procedures for Pardon, Commutation, or Clemency

Constitution of Illinois, Article V, § 12

INDIANA

Motion for New Trial

Ind. Rule PC 2 - Provides for a belated motion to correct error and belated appeal.

Ind. R. Crim. P. 16 -

(A) A motion to correct error is not a prerequisite for appeal, except when a party seeks to address newly discovered material evidence capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial.

(B) A motion to correct error shall be filed within thirty (30) days following the date of sentencing in a cause. Trial Rule 59 (Motion to Correct Error) will apply to criminal proceedings insofar as applicable and when not in conflict with any specific rule adopted by the Indiana Supreme Court for the conduct of criminal procedure.

Ind. Trial R. 59 -

(A)(1) A motion to correct error is not a prerequisite for appeal, except when a party seeks to address, *inter alia*, newly discovered material evidence capable of production within thirty (30) days after the entry of a final judgment or an appealable final order.

(C) The motion to correct error, if any, shall be filed not later than thirty (30) days after the entry of a final judgment or an appealable final order.

Post-Conviction Remedies

Ind. Rule PC 1, Sec. 1(a)(4) - Relief is available for a person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

Procedures for Pardon, Commutation, or Clemency

Constitution of Indiana, Art. 5, § 17

IOWA

Motion for New Trial

Iowa R. Crim. P. 23(2) -

(a) The application for a new trial can be made only by the defendant and shall be made not later than 45 days after plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction may be rendered, but in any case not later than five days before the date set for pronouncing judgment, but where based upon newly discovered evidence may be made after judgment as well.

(b)(8) The court may grant a new trial when the defendant has discovered important and material evidence in his or her favor since the verdict, which the defendant could not with reasonable diligence have discovered and produced at the trial. A motion based upon this ground shall be made without unreasonable delay and, in any event, within two years after final judgment, but such motion may be considered thereafter upon a showing of good cause.

Post-Conviction Remedies

IOWA CODE ANN. § 663A.2(4) (West 1987) - The remedy applies to a claim that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

IOWA CODE ANN. § 663A.3 - The application must be filed within 3 years of the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued. This time limitation does not apply to a ground of fact

or law that could not have been raised within the applicable time period.

Standard for Newly Discovered Evidence

The defendant must show: (1) the evidence was discovered after trial and before judgment; (2) it could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. *Lawson v. Iowa,* 280 N.W.2d 400, 405 (Iowa 1979).

Procedures for Pardon, Commutation, or Clemency

Constitution of Iowa, Art. 4, § 17

KANSAS

Motion for New Trial

KAN. CRIM. PROC. CODE ANN. §22-3501(1) (Vernon 1983) - A motion for a new trial based on the ground of newly discovered evidence may be made within two years after final judgment; if an appeal is pending the court may grant the motion only on remand of the case.

Post-Conviction Remedies

KAN. CIV. PROC. CODE ANN. § 60-1507 - Contains no explicit provision for newly discovered evidence.

KAN. CIV. PROC. CODE ANN. § 60-1507(a) - The prisoner may move for relief at any time.

Standard for Newly Discovered Evidence

The granting of a new trial for newly discovered evidence is in the trial court's discretion. A new trial should not be granted on the ground of newly discovered evidence unless the evidence is of such materiality that it would be likely to produce a different result upon re-trial. The credibility of the evidence offered in support of the motion is for the trial court's consideration. The burden of proof is on defendant to show the alleged newly discovered evidence could not with reasonable diligence have been produced at trial. The newly discovered evidence should change the outcome of the case. *State v. Hobson,* 697 P.2d 1274, 1275-76 (Kan. 1985).

Procedures for Pardon, Commutation, or Clemency

Constitution of Kansas, Art. I, § 7

KENTUCKY

Motion for New Trial

Ky. R. Crim. P. 10.02(1) - Upon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice.

Ky. R. Crim. P. 10.06(1) - A motion for a new trial based upon the ground of newly discovered evidence shall be made within one year after the entry of the judgment or at a later time if the court for good cause so permits.

Post-Conviction Remedies

Ky. R. Crim. P. 11.42(1) - A prisoner in custody under sentence or a defendant on probation, parole, or conditional discharge who claims a right to be released on the ground that the

sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it.

Standard for Newly Discovered Evidence

Generally, it is essential that a motion for a new trial based on newly discovered evidence be supported by the affidavits of the accused, his counsel, and the new witnesses. The rule is that in order for newly discovered evidence to support a motion for new trial in a criminal case it must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted. *Wheeler v. Commonwealth,* 395 S.W.2d 569, 571-72 (Ky. 1965).

Procedures for Pardon, Commutation, or Clemency

Constitution of Kentucky, § 77

LOUISIANA

Motion for New Trial

LA. CODE CRIM. PROC. ANN. art. 851(3) (West 1989) - The court, on motion of the defendant, shall grant a new trial whenever new and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty.

LA. CODE CRIM. PROC. ANN. art. 853 - The motion for a new trial under Article 851(3) may be filed within one year after verdict or judgment of the trial court, although a sentence has been imposed or a motion for a new trial has been previously

filed; if an appeal is pending the court may hear the motion only on remand of the case.

LA. CODE CRIM. PROC. ANN. art. 854 - A motion for a new trial under Article 851(3) shall contain sworn allegations of fact showing:

(1) That notwithstanding the exercise of reasonable diligence by the defendant, the new evidence was not discovered before or during the trial;

(2) The names of the witnesses who will testify and a concise statement of the newly discovered evidence;

(3) The facts which the witnesses or evidence will establish; and

(4) That the witnesses or evidence are not beyond the process of the court, or are otherwise available.

The newly discovered whereabouts or residence of a witness do not constitute newly discovered evidence.

Post Conviction Remedies

LA. CODE CRIM. PROC. ANN. art. 924 *et seq.* - Contains no time limitation and no explicit provision for newly discovered evidence.

Standard for Newly Discovered Evidence

The court is required to grant a new trial whenever new and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict of guilty. Neither the appellate nor supervisory jurisdiction of the Supreme Court may be invoked to review the refusal to grant a new trial, except for error of law. Great weight must be attached to the exercise of the trial judge's discretion, which should not be disturbed on review if reasonable men could differ as to the propriety of the trial judge's action. *State v. Robicheaux*, 412 So.2d 1313, 1318 (La. 1982).

Procedures for Pardon, Commutation, or Clemency

Constitution of Louisiana, Art. 4, § 5(E)

MAINE

Motion for New Trial

Me. R. Crim. P. 33 - Any motion for a new trial based on the ground of newly discovered evidence may be made only before, or within 2 years after, entry of the judgment in the criminal docket.

Post-Conviction Remedies

ME. REV. STAT. ANN. tit. 15, § 2121 (West 1980) *et seq.*- Contains no time limitation and no explicit provision for newly discovered evidence.

Procedures for Pardon, Commutation, or Clemency

Constitution of Maine, Article V, part 1, § 11

MARYLAND

Motion for New Trial

Md. R. Crim. P. 4-331 -

(a) On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.

(c) The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:

(1) in the District Court, on motion filed within one year after its imposition of sentence if an appeal has not been perfected;

(2) in the circuit courts, on motion filed within one year after its imposition of sentence or its receipt of a mandate issued by the Court of Appeals or the Courts of Special Appeals, whichever is later.

Post-Conviction Remedies

MD. CODE ANN., CRIM. LAW § 645A - Contains no time limitation and no explicit provision for newly discovered evidence.

Standard for Newly Discovered Evidence

The standard used falls between "probable," which is less demanding than "beyond a reasonable doubt," and "might" which is less stringent than probable. This standard is: the newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected. *Yorke v. State,* 556 A.2d 230, 235 (Md. 1989).

Procedures for Pardon, Commutation, or Clemency

Constitution of Maryland, Article II, § 20

MASSACHUSETTS

Motion for New Trial

Mass. R. Crim. P. 30(b) - The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done.

Post-Conviction Remedies

Mass. R. Crim. P. 30(a) - Contains no time limitation.

Procedures for Pardon, Commutation, or Clemency

Constitution of Massachusetts, Art. VIII

MICHIGAN

Motion for New Trial

Mich. Court Rule 6.431 -

(A)(1) A motion for a new trial may be filed within 42 days after entry of the judgment.

(B) On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.

Post-Conviction Remedies

Mich. Court Rule 6.502(A) - The request for relief must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

Mich. Court Rule 6.508(D)(3) - The defendant has the burden of establishing entitlement to the relief requested, and the court may not grant relief to the defendant if the motion alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates:

(a) good cause for failure to raise such grounds earlier; and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

Standard for Newly Discovered Evidence

It must be shown that the evidence itself, not merely its materiality, was newly-discovered; that it is not cumulative; that it is such as to render a different result probable on a retrial of the cause; and that the party could not with reasonable diligence, have discovered and produced it at trial. *Michigan v. Barbara,* 255 N.W.2d 171, 174 (Mich. 1977).

Procedures for Pardon, Commutation, or Clemency

Constitution of Michigan, Art. 5, § 14

MINNESOTA

Motion for New Trial

Minn. R. Crim. P. 26.04, Subd. 1 -

(1) Para. 5 - The court on written motion of the defendant may grant a new trial on the ground that there exists material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial.

(3) Notice of a motion for a new trial shall be served within 15 days after verdict or finding of guilty.

Post-Conviction Remedies

MINN. STAT. ANN. § 589 (West 1988) *et seq.* - Contains no time limitation and no explicit provision for newly discovered evidence.

Standard for Newly Discovered Evidence

Granting a new trial for newly discovered evidence is a matter of discretion with the trial court, and the inquiry of the supreme court is not whether a new trial might properly have been granted by the district court but whether refusal to grant a new trial involved a violation of a clear legal right or a plain abuse of discretion. It must be shown that the evidence could not have been discovered before trial by due diligence and that the newly discovered evidence at the time of trial was not within the knowledge of the accused or is not merely cumulative. It must also be shown that, in the event of a new trial, the newly discovered evidence will probably produce a different or more favorable result. *State v. Klotter,* 142 N.W.2d 568, 572 (Minn. 1966).

Procedures for Pardon, Commutation, or Clemency

Constitution of Minnesota, Art. 5, § 7

MISSISSIPPI

Motion for New Trial

MISS. CODE ANN. § 99-17-47 (1973) - Every new trial granted shall be on such terms as the court shall direct. No more than two new trials shall be granted to the same party in any cause.

MISS. UNIFORM CRIM. R. CIR. CT. PR. 5.16(3) (1979) -
The court may grant a new trial where new and material evidence is recently discovered which would probably produce a different result at a new trial, and such evidence could not have been discovered sooner by diligence of counsel. The motion must be made before adjournment of the term of court in which the defendant was convicted, except where the court enters an order retaining jurisdiction.

Post-Conviction Remedies

MISS. CODE ANN. § 99-39-5(1)(e) - Grounds for relief include that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

MISS. CODE ANN. § 99-39-5(2) - A motion for relief shall be made within 3 years after the time in which the prisoner's direct appeal is ruled upon by the supreme court or, if no appeal is taken, within 3 years after the time for taking an appeal has expired, or in the case of a guilty plea, within 3 years after entry of the judgment of conviction. Exception to the time limitation is made where petitioner has evidence, not reasonably discoverable at the time of trial, which is of such a nature that it would be practically conclusive that had such been introduced it would have caused a different result in the conviction or sentence.

Procedures for Pardon, Commutation, or Clemency

Constitution of Mississippi, Art. 5, § 124

MISSOURI

Motion for New Trial

Ch. 547, §§ 547.010-547.030

§ 547.030 - The motion must be filed before judgment and within 4 days of verdict. The time for filing can be extended for a period of 30 days but no longer.

Mo. R. Crim. P. 29.11(b) - A motion for new trial based on newly discovered evidence must be filed within 15 days after return of verdict, and the trial court can extend the time for one additional period not to exceed 10 days, if the defendant so requests within 15 days after the verdict.

Post-Conviction Remedies

Mo. R. Crim. P. 29.15(b) - If an appeal of the judgment sought to be vacated, set aside or corrected was taken, the motion shall be filed within thirty days after the filing of the transcript in the appeal pursuant to Rule 30.04. If no appeal of such judgment was taken, the motion shall be filed within ninety days of the date the person is delivered to the custody of the department of corrections.

Procedures for Pardon, Commutation, or Clemency

Mo. Constitution Article IV, § 7

MONTANA

Motion for New Trial

MONT. CODE ANN. § 46-16-702(2) (1991) - The motion for a new trial must be filed within 30 days following a verdict or finding of guilty.

Post-Conviction Remedies

MONT. CODE ANN. § 46-21-104 *et seq.* - Contains no explicit provision for newly discovered evidence.

MONT. CODE ANN. § 46-21-102 - A petition may be filed at any time within 5 years of the date of the conviction.

Standard for Newly Discovered Evidence

The requirements governing application for a new trial based on the ground of newly discovered evidence include: (1) that the evidence must have come to the knowledge of the applicant since the trial; (2) that it was not through want of diligence that it was not discovered earlier; (3) that it is so material that it would probably produce a different result upon another trial; (4) that it is not cumulative merely -- that is, does not speak as to facts in relation to which there was evidence at the trial; (5) that the application must be supported by the affidavit of the witness whose evidence is alleged to have been newly discovered, or its absence accounted for; and (6) that the evidence must not be such as will only tend to impeach the character or credit of a witness. Exceptions exist where, for example, the cumulative evidence may be so overwhelmingly convincing as to compel the conclusion that to sustain the verdict would be a gross injustice, or the impeaching evidence may demonstrate perjury in the witnesses upon whose evidence the verdict is founded. *State v. Miller*, 757 P.2d 1275, 1289 (Mont. 1988); *State v. Greeno*, 342 P.2d 1052, 1055 (Mont. 1959).

In order to override the five year limitation on post-conviction relief, the defendant must prove that he has been the victim of an unjust conviction which has resulted in his unlawful detention. *State v. Perry*, 758 P.2d 268, 272-73 (Mont. 1988).

Procedures for Pardon, Commutation, or Clemency

Constitution of Montana, Art. VI, § 12

NEBRASKA

Motion for New Trial

NEB. REV. STAT. § 29-2101(5) (1989) - A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for reasons affecting materially his substantial rights, which includes the existence of newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial.

NEB. REV. STAT. § 29-2103 - The district court may set aside a sentence and grant a new trial if the motion is filed within a reasonable time after the discovery of the new evidence; however, the motion must be filed within three years after the date of the verdict. This motion is the exclusive method and procedure for reviewing criminal cases after the expiration of the term in which the verdict is rendered.

Post-Conviction Remedies

NEB. REV. STAT. § 29-3001 *et seq.*- Contains no time limitation and no explicit provision for newly discovered evidence.

Standard for Newly Discovered Evidence

The motion for new trial based upon newly discovered evidence must be made within a reasonable time after discovery of the new evidence and within three years of the date of the verdict. This motion is the exclusive exception to the general rule that a motion for new trial must be filed within ten days of the verdict. The newly discovered evidence must be competent, material, credible, and might have changed the result of the trial and which by the exercise of due diligence could not have been discovered and produced at the trial. Accordingly, the new evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. *State v. Seger*, 217 N.W.2d 828, 830 (Neb. 1974).

Procedures for Pardon, Commutation, or Clemency

Constitution of Nebraska, Article IV, § 13

NEVADA

Motion for New Trial

NEV. REV. STAT. ANN. § 176.515 (Michie 1991) -

1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

3. A motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.

Exception: where a prisoner who has been sentenced to death discovers new evidence tending to prove that his conviction was illegally obtained, the evidence may be brought before the court in a petition for writ of habeas corpus after the two-year time limit has run. *Snow v. State*, 779 P.2d 96, 97 (Nev. 1989)

Post-Conviction Remedies

NEV. REV. STAT. ANN. § 177.315 *et seq*. (expires Jan. 1, 1993, if a Senate resolution is ratified by the people of the state in the general election of 1992).

NEV. REV. STAT. ANN. § 177.315(3) - Unless there is good cause for delay, a proceeding must be filed within 1 year after entry of judgment of conviction or, if an appeal has been taken, within 1 year after the final appellate decision.

NEV. REV. STAT. ANN. § 34.725 - A petitioner may not file a petition for a writ of habeas corpus unless he previously filed a petition for post-conviction relief or demonstrates good cause for the failure to file a petition and actual prejudice.

NEV. REV. STAT. ANN. § 34.800 -

1. A petition may be dismissed if delay in the filing of the petition:

(a) Prejudices the respondent or the State of Nevada in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred; or

(b) Prejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence.

2. A period exceeding 5 years between the filing of a judgment of conviction and the filing of a petition for a writ of habeas corpus creates a rebuttable presumption of prejudice to the state.

NEV. REV. STAT. ANN. § 34.810(3) - The petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

Procedures for Pardon, Commutation, or Clemency

Constitution of Nevada, Art. 5, § 14

NEW HAMPSHIRE

Motion for New Trial

N.H. REV. STAT. ANN. § 526:1 (1983) - A new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable.

N.H. REV. STAT. ANN. § 526:4 - A new trial shall not be granted unless the petition is filed within three years after the rendition of the judgment.

Standard for Newly Discovered Evidence

The granting or denial of a new trial is in the discretion of the trial court. The guidelines for the exercise of this discretion include: (1) that the moving party was not at fault for not discovering the evidence at the former trial; (2) that the evidence is admissible, material to the merits, and not cumulative; and (3) that it must be of such a character that a different result will probably be reached upon another trial. *State v. Cote,* 530 A.2d 775, 781-82 (N.H. 1987).

Procedures for Pardon, Commutation, or Clemency

Constitution of New Hampshire, Pt. 2, Art. 52

NEW JERSEY

Motion for New Trial

N.J. Court R. 3:20-2 - A motion for a new trial based on the ground of newly discovered evidence may be made at any time; if an appeal is pending the court may grant the motion only on remand of the case.

Post-Conviction Remedies

N.J. Court R. 3:22-4 - Any ground for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds: (a) that the ground for relief not previously asserted could

not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

N.J. Court R. 3:22-12 - A petition to correct an illegal sentence may be filed at any time. No other petition shall be filed pursuant to this rule more than 5 years after rendition of the judgment or sentence sought to be attacked unless it alleges facts showing that the delay beyond said time was not due to defendant's excusable neglect.

Procedures for Pardon, Commutation, or Clemency

Constitution of New Jersey, Art. 5, § 2, Para. 1

NEW MEXICO

Motion for New Trial

N.M. R. Crim. P. 5-614(C) - A motion for new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two years thereafter; if an appeal is pending the court may grant the motion only on remand of the case.

Post-Conviction Remedies

N.M. STAT. ANN. § 31-11-6 (Michie 1984) - Contains no explicit provision for newly discovered evidence.

N.M. STAT. ANN. § 31-11-6(A) - The motion for relief may be made at any time.

N.M.R.Crim.P. 5-802 - Procedures for habeas corpus petition.

N.M.R.Crim.P. 5-802 prevails over N.M. Stat. Ann. § 31-11-6 if there is a conflict between the two in a post-conviction writ for retrial. *State v. Garcia,* 680 P.2d 613, 616 (N.M.Ct. App. 1984).

Standard for Newly Discovered Evidence

The newly-discovered evidence must fulfill all of the following requirements: (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it could not have been discovered before the trial by the exercise of due diligence; (4) it must be material; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory. *State v. Shirley,* 713 P.2d 1, 3 (N.M. Ct. App. 1985).

Procedures for Pardon, Commutation, or Clemency

Constitution of New Mexico, Art. V, § 6

NEW YORK

Post-Conviction Remedies

N.Y. CRIM. PROC. LAW § 440.10 *et seq.* (McKinney 1983) - Contains no time limitation. Applies to all forms of post-conviction relief, including motions for new trial.

N.Y. CRIM. PROC. LAW § 440.10(1)(g) - Grounds for relief include that new evidence has been discovered since the entry of a judgment, which could not have been produced by the defendant at trial even with due diligence on his part, and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based on the ground must be made with due diligence after the discovery of such alleged new evidence.

Procedures for Pardon, Commutation, or Clemency

Constitution of New York, Art. IV, § 4

NORTH CAROLINA

Motion for New Trial

N.C. GEN. STAT. § 15A-1414 - Characterized as a "motion for appropriate relief," it must be made within 10 days after verdict.

Post-Conviction Remedies

N.C. GEN. STAT. § 15A-1415(a) - A petition may be filed at any time after verdict.

N.C. GEN. STAT. § 15A-1415(b)(6) - Grounds which the defendant may assert by motion made more than 10 days after entry of judgment include that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

Standard for Newly Discovered Evidence

In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that: (1) the witness will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. *State v.*

Britt, 360 S.E.2d 660, 664 (N.C. 1987); *State v. Person*, 259 S.E.2d 867, 870 (N.C. 1979).

Procedures for Pardon, Commutation, or Clemency

Constitution of North Carolina, Art. III, § 5(6)

NORTH DAKOTA

Motion for New Trial

N.D. R. Crim. P. 33(b) - A motion for a new trial based on the ground of newly discovered evidence must be made within 30 days after discovery of the facts upon which it is made and within 2 years after final judgment; if an appeal is pending the court may grant the motion only on remand of the case.

Post-Conviction Remedies

N.D. CENT. CODE § 29-32.1-01(1)(e) (1991) - Grounds for relief include that there exists evidence, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

N.D. CENT. CODE § 29-32.1-03(2) - An application may be filed at any time.

Standard for Newly Discovered Evidence

See Explanatory Note to N.C. R. Crim. P. 33 -

(1) The evidence must have been discovered since the trial, *Johnson v. United States*, 32 F.2d 127, 130 (8th Cir. 1929);

(2) Failure to learn of the evidence at the time of trial was not the result of defendant's lack of diligence, *Nagell v. United States*, 354 F.2d 441, 448-49 (5th Cir. 1966);

(3) The newly discovered evidence is material to the issues at trial, *Mesarosh v. United States*, 352 U.S. 1, 77 S. Ct. 14 (1956); and

(4) The evidence is of such a nature that it would probably produce an acquittal in the event of retrial, 8A Moore's Federal Practice and Procedure (Cipes, 2d Ed. 1972), Para. 33.03(1), at pages 33-12, 33-13.

Procedures for Pardon, Commutation, or Clemency

Constitution of North Dakota, Art. V, § 6

OHIO

Motion for New Trial

Ohio R. Crim. P. 33 -

(A)(6) A new trial may be granted on motion of the defendant for reasons affecting materially his substantial rights, including when new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.

(B) Para. 2 - Motions for new trial on account of newly discovered evidence shall be filed within 120 days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the 120 day period.

Post-Conviction Remedies

OHIO REV. CODE ANN. § 2953.21 *et seq.* (Baldwin 1986) - Contains no time limitation and no explicit provision for newly discovered evidence.

OHIO REV. CODE ANN. § 2953.23(A) - The court may, in its discretion and for good cause shown, entertain a second petition or successive petitions for similar relief on behalf of the petitioner based upon the same facts or on newly discovered evidence.

Standard for Newly Discovered Evidence

To the extent that the information is considered newly discovered evidence within the meaning of Crim.R. 33(A)(6), the motion for new trial must be filed within 120 days after the verdict. If a party is unavoidably prevented from filing a motion for new trial because the party had no knowledge of the existence of the ground supporting the motion for new trial, and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence, the motion for new trial should be allowed. *State v. Walden,* 483 N.E.2d 859; 864-65 (Ohio Ct. App. 1984).

Procedures for Pardon, Commutation, or Clemency

Constitution of Ohio, III § 11

OKLAHOMA

Motion for New Trial

OKLA. STAT. ANN. tit. 22, § 952, Para. 7 (West 1986) - A court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against a

defendant by which his substantial rights have been prejudiced when, *inter alia,* new evidence is discovered, material to the defendant, which he could not with reasonable diligence have discovered before the trial.

Okla. Court Rules and Procedure § 952
A court may grant a new trial where new evidence is discovered, material to the defendant, and which he could not with reasonable diligence have discovered before the trial.

Okla. Court Rules and Procedure § 953
A motion for new trial based on newly discovered evidence may be made within three months after such evidence is discovered, but no later than one year after judgment is rendered.

Post-Conviction Remedies

OKLA. STAT. ANN. tit. 22, § 1080 *et seq.* - Contains no time limitations except with respect to prisoners who have received the death penalty.

OKLA. STAT. ANN. tit. 22, § 1080(d) - Grounds for relief include that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

OKLA. STAT. ANN. tit. 22 § 1089(C) - Application for post-conviction relief of a defendant who is under the sentence of death must be filed within 90 days of the denial of certiorari by the U.S. Supreme Court or the expiration of the time for filing a certiorari petition.

Standard for Newly Discovered Evidence

The test for whether a motion for a new trial should be granted based upon newly discovered evidence is: (1) the evidence must be material; (2) the evidence could not have been discovered before trial with due diligence; (3) the evidence cannot be

cumulative; and (4) the evidence must create a reasonable probability that, had the newly discovered evidence been introduced at the original trial, it would have changed the outcome. *Salyers v. State,* 755 P.2d 97, 101 (Okla. Crim. App. 1988).

Procedures for Pardon, Commutation, or Clemency

Constitution of Oklahoma, Art. 6, § 10

OREGON

Motion for New Trial

OR. REV. STAT. § 136.535(1) (1989) - A motion in arrest of a judgment or a motion for a new trial shall be filed within five days after the filing of the judgment sought to be set aside, or such further time as the court may allow.

Or. R. Civ. P. 64(B)(4) - A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for reasons materially affecting the substantial rights of the party, including the existence of newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

Post-Conviction Remedies

OR. REV. STAT. § 138.510 - The petition must be filed within 120 days of judgment if no appeal was taken, or 120 days of date appeal is final, unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or an amended petition.

Procedures for Pardon, Commutation, or Clemency

Constitution of Oregon, Art. V, § 14

PENNSYLVANIA

Motion for New Trial

Pa. R. Crim. P. 1123(a) - Within ten days after a finding of guilt, the defendant may file written motions for a new trial. Only those grounds may be considered which were raised in pre-trial proceedings or at trial, unless the trial judge, upon cause shown, allows otherwise.

(d) A motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery.

Post-Conviction Remedies

42 PA. CONS. STAT. ANN. § 9541 *et seq.* (1982) - Contains no time limitation.

42 PA. CONS. STAT. ANN. § 9543(a)(1) - Grounds for relief, which petitioner must prove by a preponderance of the evidence, include the unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

Pa. R. Crim. P. 1500 *et seq.* - Post-conviction collateral proceedings.

42 PA. CONS. STAT. ANN. § 6503(b) - Where a person is restrained by virtue of sentence after conviction for a criminal offense, the writ of habeas corpus shall not be available if a remedy may be had by post-conviction hearing proceedings authorized by law.

Standard for Newly Discovered Evidence

After-discovered evidence is the basis for a new trial only if it: (1) has been discovered after the trial and could not have been obtained at, or prior to, the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely for impeaching credibility of a witness; (4) is of such nature and character that a different verdict will likely result if a new trial is granted. Furthermore, the proposed new evidence must be producible and admissible. *Commonwealth v. Brosnick*, No. 22W.D.1990, 1992 LW 103616 at *2 (Pa. 1992).

Procedures for Pardon, Commutation, or Clemency

Constitution of Pennsylvania, Art. 4, § 9

RHODE ISLAND

Motion for New Trial

R.I. Superior Court R. Crim. Proc. 33 - A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after entry of judgment by the court; if an appeal is pending the court may grant the motion only on remand of the case.

Post-Conviction Remedies

R.I. GEN. LAWS § 10-9.1-1(a)(4) (1981) - Grounds for relief include that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

R.I. GEN. LAWS § 10-9.1-3 - An application may be filed at any time.

Procedures for Pardon, Commutation, or Clemency

Constitution of Rhode Island, Art. 9, §§ 4, 13

SOUTH CAROLINA

Motion for New Trial

S.C. R. Crim. P. 29(b) - A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence; provided, however, that a motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion.

Post-Conviction Remedies

S.C. CODE ANN. § 17-27-10 *et seq.*- Contains no time limitation.

S.C. CODE ANN. § 17-27-20(a)(4) - Grounds for relief include that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

Laches may bar any claim for collateral relief based on newly discovered evidence, *McElrath v. State*, 277 S.E.2d 890 (S.C. 1981), but the State must show prejudice in order to claim laches as a bar. *Brazell v. State*, 294 S.E.2d 343 (S.C. 1982).

Standard for Newly Discovered Evidence

While a motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge, it is well settled that it may be granted only if the movant shows that the evidence upon which it is based: (1) is such as would probably change the result if a new trial was had; (2) has been

discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and, (5) is not merely cumulative or impeaching. *State v. Caskey*, 256 S.E.2d 737, 739 (S.C. 1979).

Procedures for Pardon, Commutation, or Clemency

Constitution of South Carolina, Art. IV, § 14

SOUTH DAKOTA

Motion for New Trial

S.D. CODIFIED LAWS ANN. § 15-6-59(B) - The motion for a new trial stating the grounds thereof shall be filed not later than ten days after the notice of entry of the judgment.

Post-Conviction Remedies

S.D. CODIFIED LAWS ANN. § 21-27-1 *et seq.*

S.D. CODIFIED LAWS ANN. § 21-27-3.2 - An application under this chapter may be dismissed if it appears that the state or the applicant's custodian has been prejudiced in its ability to respond to the application by delay in its filing, unless the applicant shows that the application is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances causing the prejudice occurred. It shall be presumed that the state or the applicant's custodian has been prejudiced if the application is filed more than five years after the filing of the judgment or order under which the applicant is held. This presumption is rebuttable.

Standard for Newly Discovered Evidence

For a habeas petitioner to avoid dismissal of a subsequent petition for failure to raise the issue in a prior proceeding, the petitioner must show: (1) cause for his omission or failure to previously raise the grounds for habeas relief; and (2) actual prejudice resulting from the alleged constitutional violation. *Gregory v. Solem*, 449 N.W.2d 827, 830 (S.D. 1989).

Procedures for Pardon, Commutation, or Clemency

Constitution of South Dakota, Art. IV, § 3

TENNESSEE

Motion for New Trial

Tenn. R. Crim. P. 33(b) - A motion for a new trial shall be made in writing, or if made orally in open court shall be reduced to writing, within thirty days of the date the order of sentence is entered.

Post-Conviction Remedies

TENN. CODE ANN. § 29-21-101 *et seq.* - Procedures for habeas corpus.

TENN. CODE ANN. § 40-26-105 (1990) - Relief also may be available under a writ of error coram nobis, but relief is confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that he was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if

the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

TENN. CODE ANN. § 40-27-103 - The writ of error coram nobis may be had within one year after the judgment becomes final.

TENN. CODE ANN. § 40-30-102 *et seq.* - The petition for post-conviction relief must be filed within 3 years of final appellate action.

Standard for Newly Discovered Evidence

The trial judge must make the following findings: (1) whether or not there now exists subsequently or newly discovered evidence (even though related to matters previously litigated); (2) which might have resulted in a different judgment had it been presented at trial; (3) but which was not presented at that time through no fault of the defendant. *Cole v. State,* 589 S.W.2d 941, 943 (Tenn. Crim. App. 1979).

Procedures for Pardon, Commutation, or Clemency

Constitution of Tennessee, Art. 3, § 6

UTAH

Motion for New Trial

Utah R. Crim. P. 24 - Must be made within 10 days of judgment.

Post-Conviction Remedies

Utah R. Civ. P. 65B - Procedures for a "petition for extraordinary relief."

UTAH CODE ANN. § 78-12-31.1 (1990) - A petition for relief pursuant to a writ of habeas corpus must be filed within three months of judgment. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner.

UTAH CODE ANN. § 78-12-31.2 - No post-conviction remedies may be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds therefore are based on facts or circumstances which developed or first became known within that period.

Standard for Newly Discovered Evidence

To justify a new trial, newly discovered evidence should clarify a fact that was contested and resolved against the movant, or be sufficiently persuasive that the result of the trial might be changed. Newly discovered impeachment evidence does not ordinarily warrant a new trial. *State v. Worthen,* 765 P.2d 839, 851 (Utah 1988).

Procedures for Pardon, Commutation, or Clemency

Constitution of Utah, Art. VII, § 12

VERMONT

Motion for New Trial

Vt. R. Crim. P. 33 - A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment; if an appeal is pending the court may grant the motion only on remand of the case.

Post-Conviction Remedies

VT. STAT. ANN. tit. 12, § 3952 - Contains no time limitation and no explicit provision for newly discovered evidence.

VT. STAT. ANN. tit. 13, § 7131 - A prisoner who is in custody under sentence of a court and claims the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or of the state of Vermont, or that the court was without jurisdiction to impose the sentence, or is otherwise subject to collateral attack, may at any time move the county court of the county where the sentence was imposed to vacate, set aside or correct the sentence. However, the superior or district judge who presided when the original sentence was imposed shall not hear the application.

Standard for Newly Discovered Evidence

To be entitled to a new trial based on newly discovered evidence, a defendant must show: (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. *State v. Smith,* 485 A.2d 124, 130-31 (Vt. 1984); *State v. Richards,* 470 A.2d 1187, 1190 (Vt. 1983).

Procedures for Pardon, Commutation, or Clemency

Constitution of Vermont, Ch. II, § 20

VIRGINIA

Procedures for Pardon, Commutation, or Clemency

Constitution of Virginia, Art. V, § 12

WASHINGTON

Motion for New Trial

WASH. REV. CODE ANN. § 4.76.080 - When the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the time when the verdict was rendered, the application may be made by petition filed not later than after the discovery of the new evidence. No motion shall be filed more than one year after the final judgment was rendered.

Wash. R. Crim. P. 7.6 -

(a) The court on motion of a defendant may grant a new trial when it affirmatively appears that a substantial right of the defendant was materially affected, including if there exists newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence and produced at the trial;

(b) A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

Post-Conviction Remedies

WASH. REV. CODE ANN. § 10.73.090(1) - No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after judgment becomes final.

WASH. REV. CODE ANN. § 10.73.100(1) - The time limit in RCW 10.73.090 does not apply to a petition that is based solely on newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion.

Standard for Newly Discovered Evidence

A trial court may grant a new trial on the basis of newly discovered evidence only if the evidence: (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Williams,* 634 P.2d 868 (Wash. 1981).

Procedures for Pardon, Commutation, or Clemency

Constitution of Washington, Art. 3, § 9

WEST VIRGINIA

Motion for New Trial

W. Va. R. Crim. P. 33 - A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment; if an appeal is pending the court may grant the motion only on remand of the case.

Post-Conviction Remedies

W. VA. CODE § 53-4A-1 *et seq.* (1981) - Contains no time limitation and no explicit provision for newly discovered evidence.

Standard for Newly Discovered Evidence

A new trial will be granted on the ground of newly discovered evidence in the following circumstances: (1) the evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained; (2) it must appear from facts stated in his affidavit that plaintiff was diligent in that the new

evidence is such that due diligence would not have secured it before the verdict; (3) the evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point; (4) the evidence must be such as ought to produce an opposite result at a second trial on the merits; (5) and the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. *State v. Catlett,* 376 S.E.2d 834, 835 (W. Va. 1988); *State v. Hamric,* 151 S.E.2d 252, 265 (W. Va. 1966).

Procedures for Pardon, Commutation, or Clemency

Constitution of West Virginia, Art. 7, § 11

WISCONSIN

Motion for New Trial

WIS. STAT. ANN. § 805.16(4) (West 1985) - A motion for a new trial based on newly discovered evidence may be made at any time within one year after verdict.

Post-Conviction Remedies

WIS. STAT. ANN. § 974.06 - Contains no provision for newly discovered evidence.

WIS. STAT. ANN. § 974.06(2) - The motion may be made at any time.

Standard for Newly Discovered Evidence

The requirements for granting a new trial for newly discovered evidence are: (1) the evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence

must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial. *State v. Boyce,* 249 N.W.2d 758, 760 (Wis. 1977).

Procedures for Pardon, Commutation, or Clemency

Constitution of Wisconsin, Art. 5, § 6

WYOMING

Motion for New Trial

WYO. STAT. § 7-12-301(c) (1987) - A motion for new trial based on newly discovered evidence may be made only within 2 years after final judgment.

Post-Conviction Remedies

WYO. STAT. § 7-14-101 - Contains no time limitation and no explicit provision for newly discovered evidence.

WYO. STAT. § 7-14-103(c)(ii) - This act does not apply to claims of error or denial of rights where a remedy is provided by statute or court rule for new trial, sentence reduction, sentence correction or other post-verdict motion.

WYO. STAT. § 7-14-103(d) - No petition under this act shall be allowed if filed more than five (5) years after the judgment of conviction was entered.

WYO. STAT. § 1-27-101 *et seq.* - Habeas corpus.

Standard for Newly Discovered Evidence

It is incumbent on the party who asks for a new trial on the grounds of newly discovered evidence to satisfy the court by showing: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that it did not come sooner; (3) that it is so material that it would probably produce a different verdict if the new trial were granted; and (4) that it is not cumulative, *viz.*, speaking to facts in relation to which there was evidence at the trial. *Opie v. State,* 422 P.2d 84, 85 (Wyo. 1967).

Procedures for Pardon, Commutation, or Clemency

Constitution of Wyoming, Art. 4, § 5

No. 91-7328

(6)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

LEONEL TORRES HERRERA, PETITIONER

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The United States will address the following question:

Whether the Cruel and Unusual Punishments Clause of the Eighth Amendment, or the Due Process Clause of the Fifth and Fourteenth Amendments, entitles a prisoner to obtain federal habeas corpus review of his conviction on the basis of newly discovered evidence.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-7328

LEONEL TORRES HERRERA, PETITIONER

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the proper disposition of a petition for a writ of habeas corpus in which a prisoner claims that newly discovered evidence proves his innocence. The Court's resolution of this case will affect the federal government. Rule 33, Fed. R. Crim. P., governs a defendant's claim that he is entitled to a new trial due to newly discovered evidence. Federal prisoners also can collaterally attack their convictions under 28 U.S.C. 2255. The United States also has participated as amicus curiae in other cases involving the scope of habeas corpus review. *E.g.*, *Sawyer* v. *Whitley*, No. 91-6382 (June 22, 1992); *Wright* v. *West*, No. 91-542 (June 19, 1992).

STATEMENT

1. At approximately 10:40 p.m. on September 29, 1981, the body of Texas Department of Public Safety Officer David Rucker was discovered along a highway 6.2 miles east of Los Fresnos, Texas. Officer Rucker had been killed by a gunshot wound to the head. There were no witnesses to the crime, but petitioner's social security card was discovered near the body. About ten minutes after the shooting, Los Fresnos police officer Enrique Carrisalez stopped for speeding a car traveling west from the point where Officer Rucker's body was found. Officer Carrisalez's headlights illuminated the driver's side of the stopped car. Officer Carrisalez radioed the driver's license number to the dispatcher before approaching the car. *Herrera* v. *State*, 682 S.W.2d 313, 316 (Tex. Crim. App. 1984), cert. denied, 471 U.S. 1131 (1985); *Herrera* v. *Collins*, 904 F.2d 944, 945-946, 948 (5th Cir.), cert. denied, 111 S. Ct. 307 (1990).

As Officer Carrisalez walked toward the car, the driver stepped toward the officer and fired one or more shots. One shot hit Carrisalez in the chest; he died nine days later from the wound. Enrique Hernandez, a civilian who had accompanied Officer Carrisalez that night, witnessed the shooting. Hernandez was about 15 feet from Officer Carrisalez's assailant, and, although he took cover for part of the time, he looked directly at the assailant for approximately 14 seconds. Hernandez saw Officer Carrisalez fire four shots as the other car sped away. 682 S.W.2d at 316; 904 F.2d at 946, 948.

Hernandez radioed a description of the suspect's automobile. Hernandez later went to a local police station and was shown six photographs. Hernandez selected three photographs and said that any one could have been the killer; petitioner's photograph was among the ones selected. While at the hospital, Officer Carrisalez identified petitioner from a mug shot. Over the course of the next few days, Hernandez again identified petitioner from the mug shot that had been shown to Officer Carrisalez, from

a second photographic display, and from a line-up. 682 S.W.2d at 316-317; 904 F.2d at 946.

Petitioner was arrested several days after the shooting. He had with him envelopes on which he had written a letter essentially admitting to killing Officer Carrisalez.[1] Other evidence also tied petitioner to the murders. 682 S.W.2d at 316; 904 F.2d at 946.[2]

2. Petitioner was convicted and sentenced to death for the capital murder of Officer Carrisalez.[3] Petitioner appealed his conviction and sentence to the Texas Court of Criminal Appeals, which affirmed. 682 S.W.2d 313 (1984), reh'g denied (Jan. 16, 1985). Petitioner argued, inter alia, that the pre-trial and in-trial identifications by Hernandez were unreliable and that Officer Carrisalez's identification should not have been admitted as a

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[1] "When an officer attempted to interrogate [petitioner, he] demurred that 'it was all in the letter' and suggested to police that they read a letter if they wanted to know what happened. He then invoked his Sixth Amendment right to counsel. Police then inventoried [petitioner's] belongings and located six envelopes upon which [he] had written a letter essentially admitting and offering an explanation for both police killings." 682 S.W.2d at 317; see 904 F.2d at 949 n.6 (referring to "a letter written by [petitioner] on the back of several envelopes in which he essentially admits to the killing of both officers"). The letter is reprinted at App. B, *infra*.

[2] Local law enforcement officers who knew petitioner concluded that the description of the suspect and automobile matched him and a car he was known to drive. The officers obtained an arrest warrant for petitioner and went to his house. There, the officers found the car, but not petitioner. Although the car was registered to petitioner's girlfriend, she did not own a set of keys for the car. Moreover, petitioner's girlfriend told the police that petitioner drove the car and that she had not seen the car since early in the morning before the shooting, when petitioner took the car. Finally, the car keys were found in petitioner's pants when he was arrested. Blood was found on the left side of petitioner's car, the driver's seat, and the floorboard. Forensic tests showed that the blood was the same type as Officer Rucker's and differed from petitioner's. 682 S.W.2d at 316-317, 321.

[3] Petitioner later pleaded guilty to the murder of Officer Rucker. J.A. 4.

dying declaration. The court rejected those claims, and this Court denied certiorari. 471 U.S. 1131 (1985).

3. Petitioner next filed an application for a writ of habeas corpus in state district court. The court denied relief, and the Texas Court of Criminal Appeals affirmed. *Ex parte Herrera*, No. 12,848-02 (Tex. Crim. App. Aug. 2, 1985).

Petitioner thereafter filed a petition for a writ of habeas corpus in federal district court. Petitioner again claimed that the identifications made by Hernandez and Officer Carrisalez were unreliable. The district court rejected that claim and denied the petition. *Herrera* v. *McCotter*, No. B-85-343 (S.D. Tex. Oct. 23, 1989). The Fifth Circuit affirmed. 904 F.2d 944 (1990). This Court again denied certiorari. 111 S. Ct. 307 (1990).

4. Petitioner filed a second habeas petition in state court. The court denied the application, finding that "no evidence at trial remotely suggest[ed] that anyone other than [petitioner] committed the offense." *Ex parte Herrera*, No. 81-CR-672-C (Tex. 197th Jud. Dist. Jan. 14, 1991); J.A. 10. The Texas Court of Criminal Appeals affirmed on the basis of the trial court's findings and conclusions. 819 S.W.2d 528 (1991), reh'g overruled (Sept. 18, 1991); J.A. 13-27.[4] This Court again denied certiorari. 112 S. Ct. 1074 (1992).

In the meantime, on February 18, 1992, petitioner filed his second federal habeas petition. His principal claim was that he did not murder Officer Carrisalez. Petitioner alleged that Officer Rucker, the Hidalgo County sheriff, petitioner's brother Raul Herrera, Sr., petitioner's father, and petitioner were all involved in drug trafficking; that Raul Sr. killed Officer Rucker in a disagreement over drug

[4] Two judges dissented from the decision to uphold petitioner's sentence, but not from the decision to uphold his conviction. 819 S.W.2d at 529-532 (Clinton, J., dissenting); *id.* at 528-529 (Maloney, J., dissenting).

trafficking; that Raul Sr. also killed Officer Carrisalez; and that law enforcement officers knew these facts, but did not disclose them to the defense before trial or sentencing, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petition for a Writ of Habeas Corpus 25-27 (Feb. 18, 1992).

To support those allegations, petitioner submitted four affidavits. Three affiants alleged that Raul Sr., who was dead when the affidavits were filed, had admitted murdering Officer Carrisalez. Raul Jr., petitioner's nephew and (according to counsel for respondent) a fellow inmate, claimed to be an eyewitness to the murders, and said that Raul Sr., not petitioner, was responsible. Habeas Petition App. Exhs. 10-11, 15-16.[5]

[5] Raul Jr. alleged that he and one Chavello Lopez, a business partner and friend of Raul Sr.'s, were in petitioner's car with Raul Sr. on the night of the shootings; that Raul Sr. shot the officers; that petitioner was not involved in the shootings; that he told a police officer that his father, Raul Sr., not petitioner, shot the officers; that the officer told him to remain silent about the matter; and that petitioner's lawyers had not previously asked him about the case. Habeas Petition 30-31; *id.* App. Exh. 16. Petitioner also submitted an affidavit, dated December 11, 1990, from Hector Villareal, counsel for Raul Sr. Villareal alleged that in 1984, while he was representing Raul Sr. on a charge of attempted murder, Raul Sr. told him that he, not petitioner, had shot the officers; that Raul Sr., Officer Rucker, and the Hidalgo County sheriff were all involved in drug trafficking; that after petitioner was convicted Raul Sr. started blackmailing the sheriff, because the sheriff knew that petitioner was innocent; that Raul Sr. was murdered thereafter; and that, according to Villareal, Raul Sr. was murdered by one Jose Lopez, who also was involved in drug trafficking with the sheriff, to silence Raul Sr. Habeas Petition 31-33; *id.* App. Exh. 10. In another affidavit, one Juan Palacios alleged that, while he and Raul Sr. were in jail together, Raul Sr. confessed to him that he had murdered the officers. Habeas Petition 33-34; *id.* App. Exh. 11. Finally, in an affidavit dated January 3, 1991, one Jose Ybarra alleged that Raul Sr. spontaneously told Ybarra outside a bar one night during the summer of 1983 that he had murdered the officers. *Id.* App. Exh. 15.

The district court dismissed most of petitioner's claims as an abuse of the writ under *McCleskey* v. *Zant*, 111 S. Ct. 1454 (1991). The court ordered an evidentiary hearing on the *Brady* issue and on petitioner's claim that he did not murder Officer Carrisalez. The court stayed petitioner's execution pending the hearing. *Herrera* v. *Collins*, No. M-92-30 (S.D. Tex. Feb. 17, 1992); J.A. 28-53.[6]

Respondent appealed, and the Fifth Circuit vacated the stay of execution. 954 F.2d 1029 (1992); J.A. 59-69. The court found "disingenuous" petitioner's attempt to couch his actual innocence claim as a *Brady* violation, since there was no indication that the State had concealed evidence and since the evidence petitioner cited was equally available to him. J.A. 64. The court also ruled that petitioner's affidavits did not raise a substantial claim for relief. Relying on *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963), the court held that newly discovered evidence claims are not cognizable in federal habeas corpus. J.A. 67. The court vacated the stay of execution and certificate of probable cause. J.A. 69.[7]

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[6] Initially, the court dismissed petitioner's *Brady* claim on the ground that there were insufficient facts to support it. J.A. 37-38. On reconsideration, the court granted a hearing on that claim and the actual innocence claim. J.A. 54-55.

[7] After the court of appeals vacated the stay, petitioner filed a rehearing petition to which he attached a new affidavit by Raul Jr. In it, Raul Jr. alleged that, during petitioner's trial, various law enforcement officers and the Hidalgo County sheriff, frightened that their drug trafficking would be exposed, came to his house; told Raul Sr. not to say what had happened the night of the shootings; and also threatened Raul Jr.'s family. Aff. of Raul Herrera, Jr., 2-3 (Feb. 17, 1992), attached to Petition for Rehearing (Feb. 19, 1992).

In the meantime, the district court dismissed without prejudice petitioner's actual innocence claim, so that he could present it to the state courts. (Texas courts will not consider a claim that is under consideration in a federal habeas corpus petition.) The state district court rejected petitioner's claim, finding that "[t]he newly related evidence, if it existed at the time of trial, was available to and discoverable by the defense through reasonable diligence." *Ex parte Herrera*, No. 81-CR-672-C (Tex. 197th Jud. Dist. Feb. 19, 1992), slip op. 1. The court also ruled that "[t]here are no material, previously unresolved issues of fact which are material to the legality of [petitioner's] conviction and sentence, and an evidentiary hearing is not required. [His] allegations do not provide a basis for relief under *Brady* v. *Maryland*, 373 U.S. 83 (1963)." Slip op. 1. Petitioner then filed a third habeas petition in federal court, to which Raul Jr.'s new affidavit was attached as Exhibit 21. Petition for a Writ of Habeas Corpus, *et al.* (Feb. 19, 1992).

Petitioner sought review in this Court. The Court granted the certiorari petition but denied a stay of execution. 112 S. Ct. 1074 (1992). The Texas courts later stayed petitioner's execution.

SUMMARY OF ARGUMENT

I. Petitioner claims that the Cruel and Unusual Punishments Clause bars his execution because he has a colorable claim of actual innocence. But that Clause only limits the penalty imposed on a convicted defendant; other clauses, such as the Due Process Clause, regulate the trial process. Because petitioner's claim goes to his conviction rather than his sentence, the Eighth Amendment is inapplicable.

II. Petitioner's claim is that the Due Process Clause requires that there be judicial review of a claim of actual innocence based on newly discovered evidence. But it is well established that the Clause does not guarantee a defendant the right to appeal a trial court judgment of conviction, let alone collaterally to challenge a conviction. If a State does allow a challenge to a conviction based on newly discovered evidence, nothing in the Due Process Clause bars the State from enforcing its time limit on judicial consideration of such challenges. Nor would a contrary rule benefit petitioner, since the affidavits he filed, viewed in light of the overwhelming proof of his guilt, would not require a rational jury to acquit him at a retrial.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DENIED PETITIONER RELIEF ON HIS CLAIM OF NEWLY DISCOVERED EVIDENCE

Nearly three decades ago in *Townsend* v. *Sain*, 372 U.S. 293 (1963), Chief Justice Earl Warren, writing for the Court, explained that a habeas petitioner's claim of newly discovered evidence does not entitle him to relief unless he can link that evidence to a constitutional violation. In Chief Justice Warren's words, *id.* at 317 (emphasis added):

> Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; *the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.*

The question is whether the Court's statement in *Townsend* is still good law.[8] Put differently, does the Constitution require that a prisoner have the right to seek judicial review of a claim of newly discovered evidence, instead of being required to seek relief in the clemency process? In our view, the Constitution does not guarantee a prisoner such a right.

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[8] Since *Townsend*, the federal courts have held that a state prisoner cannot obtain habeas corpus relief based simply on a claim of newly discovered evidence. See, *e.g.*, *Boyd* v. *Puckett*, 905 F.2d 895 (5th Cir.), cert. denied, 111 S. Ct. 526 (1990); *Stockton* v. *Virginia*, 852 F.2d 740, 749 (4th Cir. 1988), cert. denied, 489 U.S. 1071 (1989); *Swindle* v. *Davis*, 846 F.2d 706 (11th Cir. 1988); *Walker* v. *Lockhart*, 763 F.2d 942, 960 (8th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986). That rule applies in capital cases. See *Byrd* v. *Armontrout*, 880 F.2d 1, 8 (8th Cir. 1989), cert. denied, 494 U.S. 1019 (1990). The cases petitioner cites, Br. 39-40 n.52, involved recanted or allegedly perjurious testimony.

I. THE EIGHTH AMENDMENT DOES NOT REGULATE THE FACTFINDING PROCESS OF DETERMINING A DEFENDANT'S GUILT OR INNOCENCE

From the premise that the execution of an innocent person violates the Eighth Amendment, petitioner argues that the Eighth Amendment grants a prisoner the right to judicial relief from the death penalty based on newly discovered evidence of his innocence. Ironically, while petitioner contends that he did not kill Officer Carrisalez, petitioner does not challenge his conviction, only his sentence. As he puts it, Br. 39-40 n.52:

> Petitioner's challenge is to his unjust execution, not his conviction[.] * * * [A] remedy that may be unavailable to an imprisoned person may be available for a death sentenced inmate. * * * Petitioner is asserting that it violates the Eighth and Fourteenth Amendments to execute him because he is innocent.

Those statements illustrate the confusion in petitioner's theory. The gravamen of petitioner's claim is that newly discovered evidence shows that he did not murder Officer Carrisalez. If petitioner's theory and factual allegations are correct, petitioner should be asking for a new trial, not just a sentence less than death, because the newly discovered evidence would undermine the validity of his conviction. For that reason, the question presented is not limited to capital cases, as petitioner suggests. If a condemned prisoner can challenge his conviction due to newly discovered evidence, then so too can a prisoner serving a term of years.

That conclusion also affects the analysis of petitioner's claim. The Due Process Clause bars the government from punishing someone unless and until it has proved his guilt beyond a reasonable doubt in accordance with Fifth and Sixth Amendment guarantees. By contrast, the Eighth Amendment, as relevant here, assumes that a person has been validly convicted. Because petitioner's claim is ultimately that he is innocent, the Eighth Amendment has no application to this case.

1. The Eighth Amendment prohibits the imposition of "[e]xcessive bail," "excessive fines," and "cruel and unusual punishments." The text speaks to pretrial and post-trial matters, rather than to the trial itself. Other provisions of the Constitution regulate the process of a criminal trial. Article III, § 2, Cl. 3, guarantees a defendant the right to a jury trial in the State where the crime was committed, or where Congress directs, if the crime was committed outside the States. The Fifth and Sixth Amendments regulate trials in various ways. They require an indictment by a grand jury for a capital or "otherwise infamous crime" (generally any felony); notice of the charges; a speedy and public jury trial in the State and district where the offense was committed; the assistance of counsel, compulsory process, and confrontation at trial; as well as protection against twice being placed in jeopardy of life or limb for the same offense. These provisions, not the Cruel and Unusual Punishments Clause, regulate the trial process; the latter simply limits the punishment that can be imposed on someone who is validly convicted of a crime. If a person has not been validly convicted the question is not whether he is being punished consistent with the Eighth Amendment; he may not be punished at all.

2. The history of the Eighth Amendment is consistent with the evident meaning of the text. The phrase "cruel and unusual punishments" was used in the Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, ch. 2. While historians disagree over the precise events that triggered the adoption of that provision, they agree that it was directed against unauthorized and perhaps grossly disproportionate penalties. The Cruel and Unusual Punishments Clause was taken verbatim from the English Bill of Rights of 1689. It was likely adopted to meet complaints voiced in the state ratifying conventions that the Constitution did not limit the types of punishments that Congress could impose. See *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2687-2691 (1991) (opinion of Scalia, J.); *Gregg* v. *Georgia*, 428 U.S. 153, 169-170 n.17 (1976) (lead opinion); Granucci, "*Nor Cruel and Unusual Punishments Inflicted*": *The Original Meaning*, 57 Calif. L. Rev. 839 (1969). Thus, the history of the Clause reveals that it was designed to regulate the punishment that could be imposed on a person validly convicted of a crime, not the determination of guilt or innocence.

3. That conclusion is buttressed by the judicial interpretations of the Eighth Amendment and its state counterparts. State courts in the 19th century construed such provisions as prohibiting only certain types of punishment.[9] For example, the General Court of Virginia read Section 9 of the Virginia Declaration of Rights of 1776, the direct predecessor to the Cruel and Unusual Punishments Clause, as "merely applicable to the modes of punishment" and as "declaim[ing] against the wanton cruelty of many of the punishments practised in other countries." *Aldridge* v. *Commonwealth*, 4 Va. 447, 449-450 (1824). Such decisions did not construe state constitutional versions of the Eighth Amendment as regulating the trial or post-trial processes.

This Court's cases are similar. Initially, they involved the issue whether a particular mode of punishment, by its nature, was cruel and unusual and thus could never be imposed on a defendant convicted of any offense, however heinous.[10] More recently, the overwhelming majority of the Court's cases have focused on the process by

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[9] See, *e.g.*, *Commonwealth* v. *Hitchings*, 71 Mass. 482, 486 (1855); *Whitten* v. *State*, 47 Ga. 297, 301 (1872); *State* v. *Driver*, 78 N.C. 423 (1878); *Cummins* v. *People*, 42 Mich. 142, 3 N.W. 305 (1879); *State* v. *Williams*, 77 Mo. 310 (1883); *State* v. *White*, 44 Kan. 514, 516-521 (1890); *State* v. *Becker*, 3 S.D. 29, 51 N.W. 1018, 1022 (1892); *Hobbs* v. *State*, 133 Ind. 404, 408-410, 32 N.E. 1019, 1020-1021 (1893); *Garvey* v. *Whitaker*, 48 La. 527, 530-533, 19 So. 457, 458-459 (1896); *Jackson* v. *United States*, 102 F. 473 (9th Cir. 1900).

[10] *Francis* v. *Resweber*, 329 U.S. 459 (1947) (second attempt at electrocution after first effort failed); *In re Kemmler*, 136 U.S. 436 (1890) (electrocution); *Wilkerson* v. *Utah*, 99 U.S. 130 (1879) (firing squad).

which certain punishments (particularly the death penalty) must be administered.[11] Otherwise, the Court's decisions have focused on issues such as whether a particular sentence is excessive for a certain offense,[12] whether a particular sanction can be imposed or carried out on certain persons,[13] whether the State has exceeded the scope of the punishment that can be imposed on a prisoner,[14] and whether certain conduct can be subject to criminal punishment at all.[15] Those decisions do not grant a right to challenge the accuracy of the verdict of guilt or innocence on direct or collateral review.

II. THE DUE PROCESS CLAUSE DOES NOT GUARANTEE A PRISONER A JUDICIAL REMEDY FOR A CLAIM OF NEWLY DISCOVERED EVIDENCE

Petitioner addresses his argument to the wrong question. It is settled that the Constitution does not allow an innocent person to be executed; the Due Process Clause prohibits government from punishing someone unless and until it has proved his guilt beyond a reasonable doubt at a criminal trial in accordance with relevant constitutional guarantees. *Bell* v. *Wolfish*, 441 U.S. 520, 535-536 & n.16 (1979). The State, however, has satisfied that requirement; it proved petitioner's guilt at a trial

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[11] *E.g.*, *Harmelin*, 111 S. Ct. at 2702 (mandatory sentences); *Blystone* v. *Pennsylvania*, 494 U.S. 299 (1990), and *Furman* v. *Georgia*, 408 U.S. 238 (1972) (death penalty).

[12] *E.g.*, *Harmelin*; *Tison* v. *Arizona*, 481 U.S. 137 (1987); *Coker* v. *Georgia*, 433 U.S. 584 (1977); *Gregg* v. *Georgia*, 428 U.S. 153 (1976).

[13] *E.g.*, *Stanford* v. *Kentucky*, 492 U.S. 361 (1989); *Penry* v. *Lynaugh*, 492 U.S. 302 (1989); *Ford* v. *Wainwright*, 477 U.S. 399 (1986).

[14] *E.g.*, *Hudson* v. *McMillian*, 112 S. Ct. 995 (1992); *Estelle* v. *Gamble*, 429 U.S. 97 (1976).

[15] *Powell* v. *Texas*, 392 U.S. 514 (1968); *Robinson* v. *California*, 370 U.S. 660 (1962).

that is not under challenge, so petitioner is no longer "innocent." For that reason, the question is not whether the Constitution bars the punishment of an innocent person, but whether it requires a State to establish a judicial, post-conviction mechanism for entertaining a prisoner's challenge to his conviction on the basis of newly discovered evidence. In our view, it does not.

A. Due Process Does Not Require That Judicial Review Be Available For A Claim Of Newly Discovered Evidence

Petitioner challenges his sentence on the ground that he is innocent of the crime, not on the ground that a specific constitutional provision was violated at his trial. The only constitutional provision that could be relevant to such a claim is the Due Process Clause; the issue therefore ultimately reduces to whether that Clause guarantees petitioner relief on his claim of newly discovered evidence. In our view, due process does not entitle a prisoner to a judicial remedy for newly discovered evidence. Even if it did, however, a State can fix a reasonable time limit for such motions.

1. *A State need not provide a judicial forum for resolution of a claim of newly discovered evidence*

a. Several provisions of the Constitution regulate the trial process and therefore contemplate that a defendant must be tried before he can be punished. By contrast, the Constitution nowhere contains a right to take an appeal from a judgment of conviction, or to seek a new trial on any ground, legal or factual. The only relevant provision is the Suspension Clause, which refers to "[t]he Privilege of the Writ of Habeas Corpus," Art. I, § 9, Cl. 2. But the writ mentioned in that Clause was merely a means of preventing improper executive detention of persons who had not been convicted of any crime. The Suspension Clause did not require the federal and state governments

to establish appellate or post-conviction mechanisms as part of the criminal process, nor did it envision that federal courts in habeas corpus proceedings would entertain challenges to state court criminal judgments.[16]

b. Thus, the Court has long held that a defendant does not have a constitutional right to appeal his conviction or sentence to a state appellate tribunal. The Court first stated that principle nearly a century ago in *McKane* v. *Durston*, 153 U.S. 684, 687-688 (1894). In ruling that the defendant was not unconstitutionally denied bail pending appeal of his conviction, the first Justice Harlan wrote:

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such review. A citation of authorities upon the point is unnecessary.
>
> It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. * * * [W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.

Shortly after *McKane* was decided, the Court applied that rule in a capital case, *Andrews* v. *Swartz*, 156 U.S. 272 (1895). There, a state law granted a convicted de-

[16] See *Swain* v. *Pressley*, 430 U.S. 372, 384-386 (1977) (opinion of Burger, C.J.); *Stone* v. *Powell*, 428 U.S. 465, 474-475 (1976); *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion) (dictum); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970). Not until well into this century did plenary federal review of state court convictions become a commonplace feature of habeas corpus. See generally *Wainwright* v. *Sykes*, 433 U.S. 72, 79 (1977).

fendant a right of appeal in non-capital cases, but made appeal discretionary in capital cases. The defendant was convicted of murder and sentenced to death. When his application to appeal was denied, he sought review in this Court, contending that the state law was unconstitutional. Citing *McKane*, this Court rejected that claim. 156 U.S. at 274-275. This Court also noted that a defendant can always seek review of a *federal* claim in this Court in order to challenge his conviction. *Id.* at 276; see also *Bergemann* v. *Backer*, 157 U.S. 655, 659 (1895) (rejecting similar claim in a capital case); *Ex parte Gordon*, 66 U.S. (1 Black) 503 (1862) (no right to appeal unless authorized by statute even in a capital case).

The rule articulated in *McKane* and applied in *Andrews* is still valid today. This Court has frequently reiterated the proposition that the Due Process Clause guarantees a defendant the right to a fair trial, not a right to challenge the trial court's judgment of conviction on appeal.[17] Relying on that principle, the Court has recently made clear that the States have no constitutional obligation to

[17] See *Bergemann* v. *Backer*, 157 U.S. 655, 659 (1895); *Kohl* v. *Lehlback*, 160 U.S. 293, 297, 299 (1895); *Murphy* v. *Massachusetts*, 177 U.S. 155, 158 (1900); *Reetz* v. *Michigan*, 188 U.S. 505, 508 (1903); *Frank* v. *Mangum*, 237 U.S. 309, 327 (1915); *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533, 536 (1926); *Ohio* v. *Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930); *Willis* v. *Tennessee*, 296 U.S. 533 (1935); *District of Columbia* v. *Clawans*, 300 U.S. 617, 627 (1937); *Carter* v. *Illinois*, 329 U.S. 173, 175 (1946); *Brown* v. *Allen*, 344 U.S. 443, 486 n.36 (1953); *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37, 42 n.6 (1954); *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion); *id.* at 21 (Frankfurter, J., concurring in the judgment); *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972); *Ortwein* v. *Schwab*, 410 U.S. 656, 660 (1973); *Ross* v. *Moffitt*, 417 U.S. 600, 606, 611 (1974); *Estelle* v. *Dorrough*, 420 U.S. 534, 536 (1975); *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion); *Abney* v. *United States*, 431 U.S. 651, 656 (1977); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985); *Pennsylvania* v. *Finley*, 481 U.S. 551, 555-556 (1987); *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion).

establish post-conviction judicial remedies for convicted defendants. See *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *Pennsylvania* v. *Finley*, 481 U.S. 551, 555-556 (1987).

The rationale of *McKane* and *Andrews* is also still valid. The Due Process Clause embodies what the Court has termed "the inherent right of defence," but does not include a right "to review a judgment by way of error or appeal," which instead is a matter of "grace or favor." *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37, 42 n.6 (1954) (quoting *Hovey* v. *Elliott*, 167 U.S. 409, 443 (1897)). Of course, "[c]ourts do make mistakes," *Willy* v. *Coastal Corp.*, 112 S. Ct. 1076, 1081 (1992). Congress and state legislatures thus have chosen to authorize direct appeal in criminal cases. But that now-universal practice does not mean that due process requires such review, and it certainly does not require a State to adopt a post-conviction mechanism to avoid any possibility of error. See *Medina* v. *California*, No. 90-8370 (June 22, 1992), slip op. 13 (quoting *Patterson* v. *New York*, 432 U.S. 197, 208 (1977)) ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."). Moreover, a defendant can seek relief in this Court if he claims that the state courts violated his federal rights. *Andrews* v. *Swartz*, 156 U.S. at 276. A defendant convicted in state court therefore always has an opportunity to seek judicial review of a federal claim.

c. Petitioner relies on several cases in which the Court has discussed the concept of "actual innocence" in connection with the habeas corpus process. The Court has said that a prisoner who has forfeited his right to seek relief on habeas corpus due to a procedural default in the state courts or an abuse of the writ under 28 U.S.C. 2244(b) can still obtain relief if he can establish his "actual innocence." See *Sawyer* v. *Whitley*, *supra*; *McCleskey* v. *Zant*, 111 S. Ct. at 1471-1474; *Smith* v. *Murray*, 477 U.S. 527, 537-538 (1986); *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986); *Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986) (plurality opinion). Those cases do not aid petitioner, however, since they rest on the principle that the federal courts can invoke their "equitable discretion" in habeas corpus to excuse procedural defaults in order to ensure that a *federal constitutional error* does not lead to the conviction of an innocent person. *McCleskey*, 111 S. Ct. at 1474. By contrast, petitioner does not seek to excuse his failure properly to preserve a claim of legal error on the ground that he is innocent. Rather, his claim is that, even if the verdict was not infected by constitutional error, or indeed, any *legal* error at all, that verdict is factually inaccurate, as new evidence reveals. That difference is significant. Federal courts have discretion to excuse procedural default rules that this Court itself has developed, but federal courts lack supervisory power over state courts and cannot vacate a state conviction absent a constitutional violation. *Smith* v. *Phillips*, 455 U.S. 209, 221 (1982). The equitable power recognized in cases such as *McCleskey* and *Murray* therefore does not extend nearly as far as petitioner's argument demands.

The closest decision by this Court is *Jackson* v. *Virginia*, 443 U.S. 307 (1979). *Jackson* held that due process requires the State to prove a defendant's guilt by evidence sufficient to persuade a rational trier of fact beyond a reasonable doubt of every element of the charged offense, and that federal courts can review the sufficiency of the evidence on habeas corpus. Yet *Jackson* does not help petitioner, for two related reasons.

First, judicial review of the sufficiency of the evidence is limited to the record. *Jackson*, 443 U.S. at 319. By definition, then, the due process principle adopted in *Jackson* does not extend to later discovered evidence. Second and more importantly, the review contemplated by *Jackson* is not to determine whether the trier of fact has made the *correct* decision; it only forbids the trier

of fact from making an *irrational* decision. The standard of review that *Jackson* adopted illustrates that point. The inquiry into the sufficiency of the evidence, *Jackson* stated, "does not require a court to ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318-319 (citation and punctuation omitted). That principle does not aid petitioner, since in light of the evidence at trial, the jury's verdict surely is not irrational.

d. Executive clemency is a traditional remedy for claims of legal or factual error. The authority of a state governor to grant a pardon, commutation, or reprieve is neither granted nor withheld by the Constitution, *Rogers* v. *Peck*, 199 U.S. 425, 436 (1905); *Storti* v. *Massachusetts*, 183 U.S. 138, 142 (1901), and Texas law appears to authorize the governor to exercise clemency for any reason. See Tex. Const. Ann. art. IV, § 11 (Vernon 1984); Tex. Code Crim. Proc. Ann. art. 4801 (Vernon 1979); *Stanley* v. *State*, 490 S.W.2d 828, 834 (Tex. Crim. App. 1972). As the Fifth Circuit once wrote, "[d]ue process requires no more than compliance with the orderly procedures long established in our law to assure fundamental fairness in criminal prosecutions. Executive clemency is the last link in the chain." *Shaver* v. *Ellis*, 255 F.2d 509, 511 (1958).[18]

[18] There is no reason to fear that there is a significant risk that an innocent person will be executed under the procedures that the States have in place. Although one study asserted that 23 innocent persons have been executed in this century, see Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987), that study is seriously flawed in numerous respects, see Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan. L. Rev. 121 (1988). The direct review and collateral procedures that the federal government and the States have in place are more than ample to separate the guilty from the innocent. Given those procedures, channeling untimely allegations of newly discovered evidence to executive clemency is a reasonable way to ensure that an innocent person is neither executed nor imprisoned.

As noted below, a defendant convicted in federal court can seek relief on a claim of newly discovered evidence only within two years after his conviction becomes final. After that point, the prisoner must seek relief from the President, even if new facts prove his innocence. The Pardon Clause, Art. II, § 2, Cl. 1, authorizes the President to pardon a prisoner or to commute a capital sentence to any term of years, for any reason. See *Schick* v. *Reed*, 419 U.S. 256 (1974); *Ex parte Wells*, 59 U.S. (18 How.) 307 (1856).

It is reasonable for a State to channel untimely claims of newly discovered evidence to the clemency process, rather than a judicial proceeding. Repetitive challenges to a prisoner's capital sentence have now become the norm in capital cases,[19] and such actions often are filed shortly before a prisoner is scheduled to be executed.[20] The clemency process allows a State to enjoy the flexibility necessary to ensure that a potentially valid claim of innocence can be carefully analyzed, while also ensuring that the State's laws are not frustrated. By contrast, the potential for abuse of the writ if petitioner's submission were accepted is evident. All that a prisoner need allege to obtain a stay of his execution and an evidentiary hearing is that a new witness recently surfaced or some new medical evidence has recently come to light that casts some doubt on his guilt. A manufactured claim of inno-

[19] *E.g.*, *Vasquez* v. *Harris*, 112 S. Ct. 1713 (1992), and *Gomez* v. *United States District Court*, 112 S. Ct. 1652 (1992) (fifth action for relief by condemned prisoner); *In re Blodgett*, 112 S. Ct. 674 (1992) (three habeas petitions by condemned prisoner); *Delo* v. *Stokes*, 495 U.S. 320 (1990) (fourth habeas petition by condemned prisoner).

[20] See *Sawyer* v. *Whitley*, slip op. 6-7 & n.7; *Woodard* v. *Hutchins*, 464 U.S. 377, 380 (1984).

cence cannot be dismissed summarily, which enables a condemned prisoner to delay his execution, perhaps several times. And there is no likelihood that the risk of being held in contempt or prosecuted for perjury could possibly deter a condemned inmate from filing a frivolous or fraudulent claim of innocence. Cf. *Illinois* v. *Allen*, 397 U.S. 337, 345 (1970). These considerations show why a State could reasonably decide that the historical practice of using clemency as a safety valve fairly accommodates the competing interests.[21]

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[21] Relying on the plurality opinion in *Ford* v. *Wainwright*, 477 U.S. 399, 416 (1986), petitioner argues that clemency is an inadequate safeguard. Br. 47 n.53. Petitioner's claim is unpersuasive. While it would be unreasonable to tell a prisoner that he can claim incompetency (the issue in *Ford*) only if it arises within 30 days of sentencing, it is not unreasonable to treat differently claims of newly discovered evidence, for the reasons stated in the text. It also is immaterial that the clemency remedy is before an elected official in the State's executive branch, rather than in a court. Federal separation of powers principles do not apply to the States, so States are free to allocate decisionmaking authority to whatever branch of government they choose. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) (collecting cases). And Texas, like many other States, has an elected judiciary. See *Houston Lawyers' Ass'n* v. *Texas Attorney General*, 111 S. Ct. 2376 (1991).

Although the governor's clemency decision would not be subject to judicial review, that fact should not prevent a State from using clemency as a safety valve. In the federal system, the President's decision whether to exercise clemency is not subject to judicial review because, in the words of *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), the Pardon Clause is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Cf. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1872); *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 485 (1989) (opinion of Kennedy, J.) (Congress cannot limit a pardon); see generally *Schick* v. *Reed*, 419 U.S. 256, 266 (1974); compare *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458 (1981) (due process does not regulate clemency). If, as explained below, federal law, including the Constitution, requires that a federal prisoner in petitioner's shoes seek relief from the President and entrusts the President with the final say over this matter, due process should not impose a greater obligation on the States. They, too, should be free to use executive clemency as the safety valve protecting against a miscarriage of justice.

2. *A State can set a time limit for presenting to a court a claim of newly discovered evidence*

a. By statute, federal courts have long had power to grant defendants a new trial.[22] Originally, however, a court could do so only if it acted (or a proceeding was begun) during the term of court in which a final judgment was entered. Otherwise, a court had jurisdiction only to correct a clerical mistake. *United States* v. *Mayer*, 235 U.S. 55, 67-68 (1914); *Howell* v. *United States*, 172 F.2d 213, 215-216 (4th Cir.), cert. denied, 337 U.S. 906 (1949). In 1934, this Court departed from the common law rule in favor of a specific time limitation. Rule 2(3) of the Criminal Appeals Rules authorized district courts to grant a defendant a new trial on the ground of newly discovered evidence if he filed such a motion within 60 days after the judgment became final. Rule 2(3), 292 U.S. 659, 662 (1934). Four years later, the Court modified the Rule to allow a newly discovered evidence motion to be filed in a capital case at any time before the prisoner was executed. Rule 2(3), 304 U.S. 592, 592 (1938) (codified at 18 U.S.C. 688 (1940)).

Early in the 1940s, there was debate in the legal community over whether to abolish the time limit for new trial motions based on newly discovered evidence in order to prevent a miscarriage of justice, or to retain some

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[22] New trials were a rarity in England in 1789. Common law courts had authority to grant a new trial in misdemeanor cases, where it was sparingly used, but not in felony cases. Orfield, *New Trial in Federal Criminal Cases*, 2 Villanova L. Rev. 293 (1957); Riddell, *New Trial in Present Practice*, 27 Yale L.J. 353, 355 (1918); Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49, 57-60 (1916). The First Congress authorized federal courts to grant new trials for "reasons for which new trials have usually been granted in courts of law," Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83 (Judiciary Act of 1789), even in felony cases. See *Sparf* v. *United States*, 156 U.S. 51, 175 (1895) (Gray & Shiras, JJ., dissenting) (collecting early cases); Orfield, 2 Villanova L. Rev. at 306 & nn.29-31.

time limit in order to promote finality. Orfield, *New Trial in Federal Criminal Cases*, 2 Villanova L. Rev. 293, 296-299 (1957). The Federal Rules Advisory Committee and Attorney General Cummings advocated eliminating any time limit.[23] That view, however, did not prevail; to the contrary, the Court set a two-year time limit in new Fed. R. Crim. P. 33 and abolished the special exception for capital cases. 327 U.S. 821, 855-856 (1944).

Rule 33 has changed little since its adoption. A new trial motion based on newly discovered evidence must still be filed within two years of final judgment. Rule 45(b) also states clearly that a court "may not extend the time for taking any action under Rule[] * * * 33 * * * except to the extent and under the conditions stated in" it, and Rule 33 contains no exception to the two-year limitation. The courts also have strictly construed Rule 33. For example, in *United States* v. *Smith*, 331 U.S. 469 (1947), this Court held that Rules 33 and 45 barred a district court from granting a new trial beyond the then-applicable five-day limit for motions on grounds other than newly discovered evidence. That rationale also applies to the requirement that a new trial motion based on newly discovered evidence must be filed within two years after entry of final judgment. See *United States* v. *Robinson*, 361 U.S. 220 (1960) (strictly construing Rule 45(b) while noting that it bars enlarging time for filing a Rule 33 motion). The lower courts also have uniformly

[23] See 1942 Advisory Committee, Federal Rules of Criminal Procedure, *Federal Rules: Preliminary Draft* 102, *reprinted in* 1 M. Wilken & N. Triffin, *Drafting History of the Federal Rules of Criminal Procedure* 102, 134 (1991) [hereinafter *Drafting History*] (draft of Rule 48(c) on new trials); 1942 Advisory Committee, *Federal Rules: Preliminary Draft* 134, *reprinted in* 1 *Drafting History* (draft of Rule 31(c) on new trials); 1944 Advisory Committee, *Federal Rules: Second Preliminary Draft* 129, *reprinted in* 4 *Drafting History* 129 (draft of Rule 35 on new trials); 1944 Advisory Committee, *Federal Rules* 34-35, *reprinted in* 7 Drafting *History* 54-55 (proposed Rule 35 on new trials); Barron, *Proposed Rules of Procedure in Criminal Cases*, 2 F.R.D. 211, 218 (1941); Cummings, *The Third Great Adventure*, 3 F.R.D. 283, 287 (1943).

ruled that the Rule 33 time limits are mandatory and that a district court lacks jurisdiction to consider an untimely motion.[24] There is also no exception to that requirement. Even under the harshest of circumstances, where a defendant's innocence seems manifest, an untimely motion cannot be entertained. Clemency is the available recourse. *E.g.*, *United States* v. *Kaplan*, 101 F. Supp. 7 (S.D.N.Y. 1951) (Weinfeld, J.).[25]

b. Texas law permits a defendant to obtain a new trial based on newly discovered evidence, but requires that a motion be filed within 30 days of imposition or suspension of sentence in open court. Tex. R. App. P. 31 (a)(1). Texas courts will not consider an untimely motion.[26] Petitioner thus could have sought relief in the Texas courts if he had obtained the affidavits sooner.

[24] See, *e.g.*, *United States* v. *Spector*, 888 F.2d 583, 584 (8th Cir. 1989); *United States* v. *Cook*, 705 F.2d 350, 351 (9th Cir. 1983); *United States* v. *Cody*, 529 F.2d 564, 565-566 (8th Cir. 1976); *Howell* v. *United States*, 172 F.2d at 215-216; *United States* v. *Kaplan*, 101 F. Supp. 7 (S.D.N.Y. 1951). The commentators agree. See 8A J. Moore et al., *Moore's Federal Practice* ¶ 33.03[2] (2d ed. 1992); 3 C. Wright, *Federal Practice and Procedure* § 558 (2d ed. 1982).

[25] Chief Justice Stone made this point in transmitting to the Rules Advisory Committee matters that this Court believed should be considered by the committee. 7 *Drafting History* 7 (letter from Chief Justice Stone to Advisory Committee Chairman Arthur Vanderbilt: "It is suggested that there should be a definite time limit within which motions for a new trial based on newly discovered evidence should be made, unless the trial court in its discretion, for good cause shown, allows the motion to be filed. Is it not desirable that at some point of time further consideration of criminal cases by the court should be at an end, after which appeals should be made to Executive clemency alone?"). See also *Howell* v. *United States*, 172 F.2d at 216.

[26] See *Beathard* v. *State*, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989); *Drew* v. *State*, 743 S.W.2d 207, 222-223 (Tex. Crim. App. 1987); *Duggard* v. *State*, 688 S.W.2d 524, 528 (Tex. Crim. App. 1985), overruled on other grounds, *Williams* v. *State*, 780 S.W.2d 802 (Tex. Crim. App. 1989) (all construing predecessor to Tex. R. App. P. 31(a)(1)); 25 Texas Jur. 3d *Newly Discovered Evidence*

Petitioner implies that the 30-day limit imposed by Tex. R. App. P. 31(a)(1) is unconstitutional. Br. 38. But petitioner could not prevail had he been convicted in federal court, since his conviction became final more than six years before he filed his second habeas petition. Petitioner also could not obtain relief in at least 34 other States and the District of Columbia.[27] Given this widespread judgment that some time period is necessary, the fact that the Constitution supplies no objective standard for preferring one time period over another, and the principle that due process does not require any post-conviction judicial review, the judgment made by Texas cannot be deemed unconstitutional.

B. Petitioner Cannot Establish His Innocence

Even if petitioner were correct that the Constitution bars Texas from enforcing its time limit on judicial consideration of newly discovered evidence claims, the result in this case would not be different. Under the common law test prevailing in Texas, the other States, and

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§ 3532, at 43 (Supp. 1992). But see *Callis* v. *State*, 756 S.W.2d 826, 827-828 (Tex. App. 1st Dist. 1988) (ruling that the "good cause" provision of Tex. R. App. P. 2(b) can be used to suspend the 30-day requirement of Tex. R. App. P. 31(a)(1) if the constitution so requires; suspending the requirement because the defendant lacked counsel). A defendant cannot raise a claim of newly discovered evidence on collateral attack; he must do so on direct appeal. *Ex parte May*, 717 S.W.2d 84, 88 (Tex. Crim. App. 1986); *Ex parte Binder*, 660 S.W.2d 103, 104-106 (Tex. Crim. App. 1983).

[27] Texas is one of 16 States that require a new trial motion based on a claim of newly discovered evidence to be filed within 60 days after judgment. One State requires that a motion be filed during the term in which judgment is rendered. Five States have one-year time limits. Ten States and the District of Columbia have two-year time limits. Three States have a three-year limit. Only 15 States permit a new trial motion to be filed more than three years after conviction. Of that number, four States have time limits of less than 120 days, but allow those limits to be waived. One State has a one-year time limit that can be waived, and another has a two-year limit that can be waived. Nine States allow a convict to file a newly discovered evidence claim at any time. For the Court's convenience, the relevant laws are collected at App. A, *infra*.

the federal system, relief may be granted on the basis of newly discovered evidence only if: (1) The evidence is in fact newly discovered and was unknown to the defendant at the time of trial; (2) the defendant's failure to learn of the evidence before trial was not due to a lack of due diligence; (3) the evidence is material to the issues at trial, rather than merely cumulative or impeaching; and (4) the new evidence probably would produce an acquittal at a retrial.[28] Last Term, in *Sawyer* v. *Whitley* —a case involving a claim that the prisoner was "actually innocent" of his death sentence—this Court held that the prisoner "must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Slip op. 1.

According to the state trial court and the Texas Court of Criminal Appeals, the proof of petitioner's guilt was "overwhelming." What is more, those courts found "no evidence at trial remotely suggesting that anyone other than [petitioner] committed the offense." 682 S.W.2d at 320; 819 S.W. 2d at 528; J.A. 10. Officer Carrisalez and Enrique Hernandez both identified petitioner as the murderer, and the Texas Court of Criminal Appeals found Hernandez "unwavering in his in-court identification" of petitioner. 682 S.W.2d at 317. Petitioner also wrote a

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[28] See 8A J. Moore *et al.*, *supra*, ¶ 33.03[1], at 33-20 to 33-22; 3 C. Wright, *supra*, § 557, at 315-337; 25 Texas Jur. 3d *Newly Discovered Evidence* §§ 3487-3498 (1983); *e.g.*, *United States* v. *Tucker*, 836 F.2d 334, 336 (7th Cir.), cert. denied, 488 U.S. 855 (1988); *United States* v. *Miliet*, 804 F.2d 853, 859 (5th Cir. 1986); *Drew* v. *State*, 743 S.W.2d 207, 226 (Tex. Crim. App. 1987) (collecting cases); *Whitmore* v. *State*, 570 S.W.2d 889, 896 (Tex. Crim. App. 1976). This Court has often spoken approvingly of that standard, especially the last part. See *Boyde* v. *California*, 494 U.S. 370, 380-381 n.4 (1990); *INS* v. *Abudu*, 485 U.S. 94, 107 n.12 (1988); *United States* v. *Agurs*, 427 U.S. 97, 111 & n.19 (1976); *Mesarosh* v. *United States*, 352 U.S. 1, 9 (1956); *United States* v. *Johnson*, 327 U.S. 106, 110 n.4 (1946). The standard is often traced to the opinion of the Georgia Supreme Court more than a century ago in *Berry* v. *State*, 10 Ga. 511 (1851). See, *e.g.*, *Johnson*, 327 U.S. at 110 n.4.

letter in which he "essentially admit[ted]" killing the officers. *Ibid.*; 904 F.2d at 949 n.6. In sum, when viewed as a whole and in the light most favorable to the State, see *Jackson*, 443 U.S. at 319; *Wright* v. *West*, slip op. 18 (plurality opinion); *id.* at 6-7 n.3 (Souter, J., concurring in the judgment), the evidence powerfully established petitioner's guilt.

Petitioner's affidavits do not undermine that verdict. Whatever the merit of petitioner's claim that Officer Rucker was involved in drug trafficking, petitioner does not allege that Officer Carrisalez was so involved; Carrisalez just happened to be in the wrong place at the wrong time. Moreover, petitioner's claim rests on uncorroborated hearsay; one affidavit was submitted by a relative of petitioner's who is presently incarcerated; and the affiants' statements were not made under circumstances establishing their reliability. Compare Fed. R. Evid. 804 (b)(3). Finally, petitioner's failure to present this proof at an earlier stage of the process justifies skepticism. See *Taylor* v. *Illinois*, 484 U.S. 400, 414 (1988).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

State Time Limits on the Filing of New Trial Motions Based on Claims of Newly Discovered Evidence

State	Statutory Provision or Rule and Time Limit
Alabama	Ala. Code § 15-17-5 (1982): 30 days
Alaska	Alaska R. Ct., Crim. R. 33 (1991): 2 years
Arizona	Ariz. R. Crim. P. 24.2(a)(2) (1990): 60 days
Arkansas	Ark. R. Crim. P. 36.22 (1989): 30 days
California	Cal. Penal Code, tit. 7, § 1502 (1985): no time limit
Colorado	Col. R. Crim. P. 33 (1992): no time limit
Connecticut	Conn. Gen. Stat. Ann. §§ 52-270, 52-582; Conn. R. Super. Ct., Crim. Cases, § 904 (1992): 3 years
Delaware	Del. Super. Ct. Crim. R. 33 (1992): 2 years
District of Columbia	D.C. Super. Ct. Crim. R. 33 (1991): 2 years
Florida	Fla. R. Ct., Crim. P., R. 3.590 (1992): 10 days
Georgia	Ga. Code Ann. §§ 5-5-40, 5-5-41 (1982): 30 days, can be extended
Hawaii	Haw. R. Penal P. 33 (1989): 10 days
Idaho	Idaho Code § 19-2407 (Supp. 1991): 10 days, can be extended
Illinois	Ill. Ann. Stat. para. 116-1 (1990): 30 days
Indiana	Ind. R. Crim. P. 16 (1992): 30 days
Iowa	Iowa Code § 813.2, R. Crim. P. 23 (1979): 2 years, can be waived
Kansas	Kan. Stat. Ann. § 22-3501 (1988): 2 years
Kentucky	Ky. R. Crim. P. 10.06 (1991): 1 year, can be waived
Louisiana	La. Code Crim. Proc. Ann. art. 853 (West 1991): 1 year
Maine	Maine R. Crim. P. 33 (1991): 2 years
Maryland	Md. Ann. Code, Crim. R. 4-331 (1992): 1 year
Massachusetts	Mass. R. Crim. P. 30 (1979): no time limit
Michigan	Mich. Ct. R. Crim. P. 6.431(A)(1) (1989): 42 days

State	Statutory Provision or Rule and Time Limit
Minnesota	Minn. R. Crim. P. 26.04 (1992) : 15 days
Mississippi	Miss. Crim. R. 5.16 (1991) : motion must be made within term that judgment is issued
Missouri	Mo. R. Crim. P. 29.11 (1992) : 15-25 days
Montana	Mont. Code Ann. § 46-16-702 (1989) : 30 days
Nebraska	Neb. Rev. Stat. § 29-2103 (1985) : 3 years
Nevada	Nev. Rev. Stat. § 176.515 (1986) : 2 years
New Hampshire	N.H. Rev. Stat. Ann. § 526:4 (1974) : 3 years
New Jersey	N.J. R. Crim. Prac. 3:20-2 (1992) : no time limit
New Mexico	N.M. R. Crim. P. 5-614 (1986) : 2 years
New York	N.Y. Crim. Proc. Law § 440.10 (McKinney 1983) : no time limit
North Carolina	N.C. Gen. Stat. § 15A-1415 (1991) : no time limit
North Dakota	N.D. R. Crim. P. 33 (1990) : 2 years
Ohio	Ohio R. Crim. P. 33 (1987) : 120 days, can be waived
Oklahoma	Okla. Ct. R., ch. 15, § 953 (1992) : 1 year
Oregon	Or. Rev. Stat. Ann. tit. 14, § 136.535 (1990) : 5 days, can be waived
Pennsylvania	Pa. R. Crim. P. 1123(d) (1989) : no time limit
Rhode Island	R.I. Super. Ct. R. Crim. P. 33 (1989) : 2 years
South Carolina	S.C. R. Crim. P. 29(b) (1991) : no time limit
South Dakota	S.D. Codified Laws ch. 23A-29-1, R. 33 (1988) : 10 days
Tennessee	Tenn. R. Crim. P. 33 (1990) : 30 days
Texas	Tex. R. App. P. 31 (1986) : 30 days
Utah	Utah R. Crim. P. 24 (1990) : 10 days
Vermont	Vt. R. Crim. P. 33 (1983) : 2 years
Virginia	Va. Sup. Ct. R. 3A:15 (1991) : 21 days
Washington	Wash. Crim. R. 7.8(b) (1992) : 1 year
West Virginia	W. Va. R. Crim. P. 33 (1991) : no time limit
Wisconsin	Wis. Stat. Ann. § 809.30(2)(b) (West 1991) : 20 days
Wyoming	Wyo. R. Crim. P. 34(b) (1991) : 2 years

APPENDIX B

The letter written by petitioner and found on him at the time of his arrest, State's Exh. 76A-76G, reads as follows, Respondent's Opposition to Request for Stay of Execution *et al.* 6-7 (Feb. 16, 1992) :

> To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future's problems with problems from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that's the way it is.
>
> I'm not a tormented person. I am sane in every way. My military life has nothing to do with this. We are all out here to service one way other and other [*sic*]. I believe in the law. What would it be without this men that risk their lives for others, and that's what they should be doing—protecting life, property, and the pursuit of happiness. Sometimes, the law gets too involved with other things that profit them. The most laws that they make for people to break them, in other words, to encourage crime.
>
> What happened to Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes.
>
> My personal life, which has been a conspiracy since my high school days, has nothing to do with what has happened. The other officer that became part of our lives, me and Rucker's (Tatum), that night had not to do in this [*sic*]. He was out to do what he had to do, protect, but that's life. There's a lot of us that wear different faces in lives every day, and that is what causes problems for all. [Unintelligible word].

You have wrote all you want of my life, but think about yours, also. [Signed Leonel Herrera]

I have tapes and pictures to prove what I have said. I will prove my side if you accept to listen. You [unintelligible word] freedom of speech, even a criminal has that right. I will present myself if this is read word for word over the media, I will turn myself in; if not, don't have millions of men out there working just on me while others—robbers, rapists, or burglars—are taking advantage of the law's time. Excuse my spelling and writing. It's hard at times like this.

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